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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MAXINE M. CHESNEY

IN RE: CHASE BANK USA, N.A.)
"CHECK LOAN" CONTRACT LITIGATION,)
) MDL NO. 09-2032
)
) SAN FRANCISCO, CALIFORNIA
) FRIDAY, MARCH 18, 2011
)

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

PLAINTIFFS' LIAISON LIEFF, CABRASER, HEIMANN & BERNSTEIN,
COUNSEL 275 BATTERY STREET

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BY: ELIZABETH J. CABRASER, ESQUIRE
MICHAEL W. SOBOL, ESQUIRE
ROGER N. HELLER, ESQUIRE

FOR PLAINTIFFS

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SAN FRANCISCO, CALIFORNIA 94108

BY: ERIC H. GIBBS, ESQUIRE
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(FURTHER APPEARANCES ON FOLLOWING PAGE)

REPORTED BY: JOAN MARIE COLUMBINI, CSR 5435, RPR
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BY: ROBERT S. GREEN, ESQUIRE

FOR DEFENDANTS

STROOCK & STROOCK & LAVAN

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**BY: JULIA B. STRICKLAND, ESQUIRE
STEPHEN J. NEWMAN, ESQUIRE**

PROCEEDINGS; FRIDAY, MARCH 18, 2011

THE CLERK: CALLING MDL NUMBER 09-2032, IN RE: CHASE BANK U.S.A. CHECK LOAN CONTRACT LITIGATION.

THE COURT: OKAY, COUNSEL. STEP FORWARD, PLEASE.

MS. STRICKLAND: GOOD MORNING, YOUR HONOR. JULIA STRICKLAND FOR DEFENDANTS.

THE COURT: THANK YOU.

MR. NEWMAN: STEPHEN NEWMAN FOR DEFENDANTS, YOUR HONOR.

THE COURT: MR. NEWMAN, THANK YOU.

MS. CABRASER: GOOD MORNING, YOUR HONOR. ELIZABETH CABRASER FOR PLAINTIFFS.

THE COURT: THANK YOU.

MR. STURDEVANT: GOOD MORNING, YOUR HONOR. JIM STURDEVANT, ALSO FOR THE PLAINTIFFS.

THE COURT: MR. STURDEVANT.

MR. GIBBS: GOOD MORNING, YOUR HONOR. ERIC GIBBS FOR THE PLAINTIFFS, ALONG WITH GEOFF MUNROE.

THE COURT: THANK YOU.

MR. HELLER: GOOD MORNING, YOUR HONOR. ROGER HELLER FOR THE PLAINTIFFS, ALONG WITH MICHAEL SOBEL.

MR. SOBEL: GOOD MORNING, YOUR HONOR. MICHAEL SOBEL FOR THE PLAINTIFFS.

THE COURT: THANK YOU.

1 **MR. GREEN:** GOOD MORNING, YOUR HONOR. ROBERT GREEN
2 FOR THE PLAINTIFFS.

3 **THE COURT:** THANK YOU, MR. GREEN.

4 I DON'T KNOW HOW MANY PEOPLE INTEND TO ADDRESS THIS
5 MATTER. HOPEFULLY, ONLY ONE LAWYER PER ISSUE, MAYBE ONLY ONE
6 LAWYER FOR THE WHOLE MOTION. IF MULTIPLE PEOPLE ARE GOING TO
7 BE PARTICIPATING, PARTICULARLY FROM THE PLAINTIFFS' SIDE,
8 PLEASE STATE YOUR APPEARANCE WHEN YOU COME UP SO THAT THE
9 REPORTER CAN KEEP YOU STRAIGHT.

10 OKAY. ALL RIGHT. WHAT WE HAVE HERE IS, AS YOU WELL
11 KNOW, THE MOTION FOR CLASS CERTIFICATION. THERE WAS KIND OF AN
12 11TH-HOUR FILING FROM THE DEFENDANTS WITH A STATEMENT OF A
13 RECENT CASE PROMPTING THE PLAINTIFF THEN TO FILE A MOTION TO
14 FILE DOCUMENTS UNDER SEAL. I HAVEN'T REALLY LOOKED AT THOSE
15 DOCUMENTS YET, BUT IT'S APPARENTLY IN RESPONSE.

16 IS THAT CORRECT, MS. CABRASER?

17 **MS. CABRASER:** THAT IS CORRECT, YOUR HONOR.

18 WE GOT -- WE SAW THE FILING YESTERDAY AFTERNOON. WE
19 RESPONDED TO IT. YOU HAVE THE RESPONSE. WE ATTACHED THE
20 SCRIPT AND OUR REPORT OF AN OCTOBER 2008 FOCUS GROUP THAT CHASE
21 HAD CONDUCTED. WE REFERRED TO THE FOCUS GROUP IN OUR REPLY, I
22 THINK, AT THE BOTTOM OF PAGE 9, TOP OF PAGE 10. WE DID NOT
23 ATTACH IT AT THAT TIME. I THINK WE SHOULD HAVE. WE WOULD LIKE
24 THE COURT TO REVIEW IT BECAUSE WE THINK IT'S DIRECTLY
25 PERTINENT, NOT ONLY TO THE POINT THAT CHASE RAISED AT THE 11TH

1 HOUR, BUT THE OTHER POINTS THAT HAVE BEEN MADE IN THE CASE.

2 **THE COURT:** WELL, THEY JUST GAVE ME A CASE THAT THEY
3 SAID THEY DIDN'T KNOW ABOUT. I'M NOT SURE HOW RELEVANT THE
4 CASE IS, FRANKLY.

5 **MS. CABRASER:** WE WOULD ARGUE IT'S NOT.

6 **THE COURT:** WE CAN GET TO THAT IF WE HAVE TO, BUT I'M
7 NOT SURE ABOUT CHANGING THE RECORD ON A DIFFERENT POINT. YOU
8 HAD WANTED TO THEN PUT IN NEW EVIDENCE THAT'S REALLY NOT
9 RELATED TO THIS ISSUE OF THE -- DO YOU FEEL IT'S RELATED TO THE
10 ISSUE OF THE DAMAGES?

11 **MS. CABRASER:** WE DO FEEL IT IS RELATED, YOUR HONOR,
12 BECAUSE WHAT CHASE DID WAS SUBMIT A CASE FROM LAST YEAR, A
13 TRIAL-COURT-LEVEL CASE IN DELAWARE. WE THINK IT'S FACTUALLY
14 INAPPOSITE, BUT, NONETHELESS, CHASE USES THAT CASE TO MAKE A
15 POINT ABOUT THE PREDOMINANCE OF INDIVIDUAL DAMAGES ISSUES.

16 OUR POINT IS NOT ONLY THAT PREDOMINANCE DEALS WITH
17 LIABILITY ISSUES IN THE NINTH CIRCUIT, BUT THAT DAMAGES CAN BE
18 DETERMINED UNDER CLASSWIDE METHODOLOGIES AND FORMULA. AND WE
19 THINK THAT THE FOCUS GROUP SCRIPT AND REPORT COMPLETES THE
20 CHRONOLOGY WHICH IS DETAILED IN THE EXHIBITS WE HAD SUBMITTED.
21 IT FILLS A GAP.

22 **THE COURT:** LET'S WAIT AND SEE HOW THE CONVERSATION
23 GOES.

24 **MS. CABRASER:** ALL RIGHT.

25 **THE COURT:** OR THE HEARING, JUST BECAUSE AT SOME

1 POINT WE SHOULD HAVE THE RECORD RESOLVED HERE, AND IT COULD
2 KEEP EXPANDING, I AM AFRAID.

3 **MS. STRICKLAND:** YOUR HONOR, MAY I ACTUALLY RESPOND
4 ON THIS POINT? BECAUSE WE RECEIVED THE SAME 11TH-HOUR FILING.
5 AND WITH DUE RESPECT TO MS. CABRASER, THEIR FILING ACTUALLY IS
6 IN VIOLATION OF THE LOCAL RULES AND IN NO WAY RESPONDS.

7 WE SUBMITTED SUPPLEMENTAL AUTHORITY WHICH WAS FIRST
8 POSTED ON WESTLAW IN FEBRUARY OF THIS YEAR, AND SO IT WAS JUST
9 LOCATED. WE SUBMITTED CONSISTENT WITH THE LOCAL RULES. WE
10 GAVE THE COURT THE CASE. WE DIDN'T ARGUE.

11 **THE COURT:** ALL RIGHT. LET ME JUST SAY I'M NOT SURE
12 THAT THE DELAWARE CASE REALLY IS CONTROLLING HERE BECAUSE
13 THEY'RE RELYING ON THE THIRD CIRCUIT, AND THE NINTH CIRCUIT HAS
14 A MORE GENEROUS VIEW WITH RESPECT TO DAMAGES.

15 **MS. CABRASER:** CORRECT, YOUR HONOR.

16 **THE COURT:** I SUPPOSE IF YOU HAD A DAMAGE ISSUE WHICH
17 JUST TOTALLY OVERWHELMED EVERYTHING ELSE, THAT THAT MIGHT START
18 TO GET INTO PLAY HERE. BUT THE NINTH CIRCUIT IS FAIRLY LENIENT
19 ABOUT DIFFERENCES IN DAMAGES.

20 SO BEFORE WE GET TO THAT POINT -- AND THERE WAS EVEN
21 A QUESTION -- THIS IS WHAT I DIDN'T UNDERSTAND THE DELAWARE
22 CASE THAT I TOOK A LOOK IT. IT SOUNDED LIKE SOME PEOPLE HAD NO
23 DAMAGES AT ALL. AND IF THEY DIDN'T HAVE ANY DAMAGES, I DON'T
24 KNOW WHY THEY WERE IN THE CLASS.

25 IN OTHER WORDS, IF SOMEBODY IS A CLASS MEMBER BECAUSE

1 THEY HAD TO PAY AN ARGUABLY IMPROPER FEE, THAT MADE THEM A
2 CLASS MEMBER; THEN IF THEY DIDN'T PAY BECAUSE SOMEONE
3 OVERLOOKED THEM, OR WHATEVER HAPPENED, THEN WHY WERE THEY IN
4 THE CLASS AT ALL? THEY DIDN'T HAVE ANY DAMAGES.

5 THAT'S DIFFERENT THAN HAVING DAMAGES AND HAVING A
6 DIFFERENT AMOUNT OF DAMAGE THAN SOMEBODY ELSE. SO THE WHOLE
7 THING WAS THROWING ME OFF A BIT. I DON'T WANT TO GET HUNG UP
8 ON THE TAIL HERE BECAUSE WE HAVEN'T EVENT GOTTEN TO THE DOG.
9 THAT WAS SOMETHING I WANTED TO MENTION THAT I BARELY HAD A
10 CHANCE TO LOOK AT, AND THEN I SAW THERE WAS A RESPONSE.

11 I THINK WE SHOULD JUST GO AHEAD AT THE MOMENT WITH
12 WHAT THE MAIN ARGUMENTS ARE HERE AND NOT GET HUNG UP ON THAT.

13 **MS. CABRASER:** WE WILL BE HAPPY TO DISCUSS IT IN
14 CONTEXT.

15 **THE COURT:** ALL RIGHT. WHAT I UNDERSTAND HERE IS
16 THAT -- I WANT TO MAKE ONE THING CLEAR. THERE ARE NUMBER OF
17 ARGUMENTS THE DEFENDANT MAKES THAT MAY WELL GO TO THE MERITS OF
18 THE PLAINTIFFS' CASE; HOWEVER, THEY DID NOT APPEAR TO ME TO CUT
19 AGAINST A CLASS ACTION.

20 WHAT THE ARGUMENTS SEEM TO SAY, FOR EXAMPLE, IN ONE
21 INSTANCE AS TO THE REASONABLE EXPECTATION OF THOSE CONTRACTING,
22 THE DEFENDANT HAD THE ARGUMENT THAT THERE WAS A SURVEY AND
23 NOBODY HAD ANY EXPECTATIONS. WELL, IF NO ONE HAD THEM, THAT'S
24 THE CLASS NOT HAVING THEM, AND THAT MAY BE A PROBLEM THE CLASS
25 HAS, BUT EVERYBODY WOULD BE IN THE SAME POSITION. AND SO

1 THAT'S WHY I JUST WANT TO BE SURE EVERYONE IS CLEAR I'M NOT
2 MAKING ANY RULING ON THE MERITS OF THE PLAINTIFFS' CASE.
3 NOBODY ASKED ME TO DO THAT FIRST. ON OCCASION THEY DO. THAT
4 WAS NOT DONE HERE.

5 SO, WHAT WE'RE DEALING WITH, AS BEST AS I CAN TELL,
6 IS WHAT WOULD BE AN OBJECTIVE-LEVEL ANALYSIS OF WHAT WOULD HAVE
7 BEEN REASONABLE FOR THE PARTIES TO THIS CONTRACT TO HAVE
8 EXPECTED. WE ARE DEALING SOLELY WITH A QUESTION OF BREACH OF
9 THE COVENANT OF GOOD FAITH AND FAIR DEALING.

10 YOU HAVE AN EXPRESS PROVISION THAT COULD BE READ AS:
11 WE CAN DO ANYTHING WE WANT WHENEVER WE WANT. THEN THAT COULD
12 BE READ IN THE CONTEXT OF A VARIETY OF THINGS, INCLUDING SOME
13 CASE LAW, THOUGH NOT NECESSARILY DIRECTLY ON POINT, THAT
14 REQUIRES THE PARTIES WHEN EXERCISING DISCRETION TO DO IT IN
15 GOOD FAITH AND ARGUABLY IN A WAY THAT WOULDN'T BE TOTALLY OUT
16 OF THE EXPECTATIONS OF THE OTHER SIDE.

17 SO, WE'VE GOT THE RULE 23 PRINCIPLES IN SUBSECTION A.
18 THERE HAVE TO BE COMMON QUESTIONS. AND B, THEY HAVE TO
19 PREDOMINATE.

20 WELL, I THINK THE DEFENDANT IS ARGUING THEY DON'T
21 PREDOMINATE BASED PRIMARILY, IT SOUNDS TO ME, ON THE ARGUMENT
22 THAT WHATEVER EXPECTATIONS ANY OF THE CARD MEMBERS MIGHT HAVE
23 WOULD BE BASED ON WHATEVER SOLICITATION WAS SENT TO THEM AND
24 THAT THERE WERE MANY DIFFERENT SOLICITATIONS SENT. THAT MIGHT
25 BE THE CASE. BUT NO SIGNIFICANT DIFFERENCES HAVE BEEN POINTED

1 OUT TO THE COURT IN THOSE SOLICITATIONS, SO EVEN IF THEY
2 DIFFERED, IF THEY WEREN'T MATERIALLY DIFFERENT, I'M NOT SURE
3 HOW THAT WOULD AFFECT THE ANALYSIS.

4 SO MAYBE I'LL JUST GO THROUGH AND LOOK AT SOME OF THE
5 QUESTIONS THAT I MIGHT POSE TO YOU. I'M ASSUMING NONE OF YOU
6 HAVE ANY AUTHORITY THAT BEARS ON THE LAST CASE YOU HAD TO
7 LISTEN TO FOR 45 MINUTES, BUT IF DO YOU, FEEL FREE TO PRESENT
8 IT. OKAY. LET ME JUST SEE WHERE I HAVE THEM.

9 OKAY. MAYBE I SHOULD JUST START WITH: CAN CHASE
10 POINT OUT ANY MATERIAL DIFFERENCES IN THE OFFERS OR
11 SOLICITATIONS THAT WERE MADE TO THE CARDHOLDERS TO USE THE
12 CHECKS THAT THEY HAD PROVIDED?

13 **MS. STRICKLAND:** WELL, YOUR HONOR, LET ME RESPOND
14 DIRECTLY TO THAT QUESTION, BUT LET ME FIRST NOTE THAT IS NOT
15 THE ONLY ISSUE THAT WE VIEW AS DEFEATING PREDOMINANCE AND
16 COMMONALITY. LET'S JUST USE PREDOMINANCE.

17 **THE COURT:** OKAY.

18 **MS. STRICKLAND:** BECAUSE IT'S THE MORE ENCOMPASSING
19 CONCEPT. OBVIOUSLY, IF WE DEFEAT PREDOMINANCE, WE DEFEATED
20 COMMONALITY AS WELL.

21 THAT IS NOT THE ONLY ISSUE. IT IS CERTAINLY AN
22 ISSUE.

23 I THINK IT WOULD BE USEFUL TO GO BACK TO ACTUAL
24 STANDARD, BECAUSE WE WOULD DISAGREE WITH YOUR HONOR, AND I
25 DON'T THINK THAT DELAWARE LAW HOLDS THAT THE STANDARD HERE IS

1 ON OBJECTIVE STANDARD.

2 THE CASE THAT OBVIOUSLY IS CONTROLLING HERE IS THE
3 NEMEC CASE, AND NEMEC VERY CLEARLY LAYS OUT THE STANDARD WHICH
4 IS PROBABLY SUBJECTIVE AND OBJECTIVE. THE STANDARD IS THAT THE
5 COURT WILL NOT IMPLY CONTRACT TERMS WHEN THE PARTY ASSERTING
6 THE IMPLIED COVENANT PROVES THAT THE OTHER PARTY -- WELL, WILL
7 IMPLY. LET ME NOT PUT A DOUBLE NEGATIVE HERE.

8 BUT YOU CAN ONLY HAVE AN IMPLIED COVENANT CLAIM WHERE
9 YOU PROVE THAT THE OTHER PARTY HAS ACTED ARBITRARILY OR
10 UNREASONABLY, THEREBY FRUSTRATING THE FRUITS OF THE BARGAIN
11 THAT -- AND THIS IS THE CRITICAL QUESTION -- THE ASSERTING
12 PARTY REASONABLY ANTICIPATED.

13 I BELIEVE WHAT YOUR HONOR SAID, THIS IS AN OBJECTIVE
14 STANDARD, WELL, WE WOULD CONTEND THAT IT'S NOT. THERE'S NO
15 DELAWARE CASE LAW THAT SAYS THE STANDARD FOR DETERMINING
16 WHETHER EXPECTATIONS WERE REASONABLE IS OBJECTIVE, AND WE WOULD
17 ARGUE THAT, ACTUALLY, THERE ARE TWO COMPONENTS.

18 HAVING THE EXPECTATION IN THE FIRST INSTANCE IS
19 ACTUALLY SUBJECTIVE. DID YOU HAVE IT OR DIDN'T YOU HAVE IT?
20 AND THAT'S WHERE PLAINTIFFS HAVE NOT MET THEIR BURDEN OF PROOF.

21 WHETHER THE EXPECTATION WAS REASONABLE MAY BE AN
22 OBJECTIVE STANDARD, BUT THE HURDLE THAT THE PLAINTIFFS HAVE
23 FAILED TO SATISFY HERE IS WHETHER THEIR CLASS HAD AN
24 EXPECTATION AT ALL, AND WE CAN GET INTO THAT, BUT WE WOULD
25 SUBMIT THAT THEY HAVE NOT MET THEIR BURDEN, AND ONE OF THE

1 THINGS THAT OBVIOUSLY IS CRITICAL TO REMEMBER HERE IS THAT THE
2 BURDEN IS ON THEM.

3 WE HAVE SUBMITTED A LOT OF EVIDENCE. A MARKET
4 SURVEY, DEPOSITION TESTIMONY FROM THE PLAINTIFFS. NOTABLY,
5 THEY HAVE NOT MET THAT EVIDENCE WITH EVIDENCE OF THEIR OWN.
6 WHAT THEY'VE DONE IS TAKEN POTSHOTS AT WHAT WE'VE SUBMITTED.
7 BUT THERE'S A REAL QUESTION AS TO WHETHER THEY'VE MET THEIR
8 BURDEN UNDER HYDROGEN PEROXIDE AND IPO. THERE IS NO
9 PREPONDERANCE OF THE EVIDENCE HERE IN THEIR FAVOR.

10 SO WITH THAT, LET ME JUST SAY, RESPONDING TO THE
11 COURT'S QUESTION ON THE MATERIAL DIFFERENCES, AGAIN, ONE OF THE
12 ISSUES, NOT THE ONLY ISSUE, DEFEATING PREDOMINANCE -- I'M HAPPY
13 TO LIST OFF THE ISSUES, WHICH I CONVENIENTLY MADE YOUR HONOR A
14 LIST BECAUSE I THOUGHT THIS WOULD COME UP.

15 **THE COURT:** I DON'T SAY -- LET ME PUT IT THIS WAY:
16 IT WOULD HELP IF YOU GAVE ME THE LIST BEFORE.

17 **MS. STRICKLAND:** THE LIST IS ACTUALLY IN OUR PAPERS.

18 **THE COURT:** EXCUSE ME. WHERE?

19 **MS. STRICKLAND:** IT IS AT PAGE -- I WILL TELL YOU.
20 IN OUR BRIEF -- WE ACTUALLY COMPILED THE LIST FOR THIS EXACT
21 REASON --

22 **THE COURT:** WHAT DO YOU MEAN BY "THE LIST"? PERHAPS
23 I AM --

24 **MS. STRICKLAND:** I'M SORRY. YOU AND I MAY BE
25 SPEAKING OF DIFFERENT LISTS. THE LIST I'M SPEAKING OF IS THE

1 NON-PREDOMINANT ISSUES. THE LIST OF THE VARIATIONS IN THE
2 SOLICITATIONS I WILL --

3 **THE COURT:** IS THAT ACTUALLY --

4 **MS. STRICKLAND:** THAT IS NOT LISTED. WE'VE PROVIDED
5 THE COURT WITH THE SOLICITATIONS.

6 **THE COURT:** RIGHT. I LOOKED AT THEM, AND I WAS
7 HAVING TROUBLE SEEING MATERIAL DIFFERENCES.

8 **MS. STRICKLAND:** LET ME ADDRESS THAT.

9 **THE COURT:** I THOUGHT MAYBE YOU COULD -- EXCUSE ME.
10 WE CAN'T BOTH TALK AT THE SAME TIME.

11 **MS. STRICKLAND:** I APOLOGIZE.

12 **THE COURT:** I KNOW YOU ARE VERY CHARGED UP HERE,
13 READY TO GO, BUT NONETHELESS...

14 ALL RIGHT. NOW, IF THERE ARE MATERIAL DIFFERENCES
15 BETWEEN THESE VARIOUS SOLICITATIONS, THAT WOULD HAVE BEEN NICE
16 TO HAVE IN ADVANCE OF THE HEARING, BUT IF YOU HAVE IT NOW, YOU
17 COULD POINT ME TO THEM, I SUPPOSE.

18 **MS. STRICKLAND:** I WILL DO THAT, YOUR HONOR.

19 **THE COURT:** OKAY.

20 **MS. STRICKLAND:** THANK YOU.

21 LET ME START BY SAYING THAT, NOTABLY, THE
22 SOLICITATION THAT IS ATTACHED TO THE COMPLAINT, AND ON WHICH
23 PLAINTIFFS BASE THEIR CASE, AND ON WHICH THEIR PURPORTED EXPERT
24 RELIES, IS A SOLICITATION, AND THIS IS IN THE RECORD, THAT WAS
25 ONLY SENT TO ONE OF THE PUTATIVE NAMED PLAINTIFFS HERE. SO IF

1 NINE OUT OF TEN NEVER RECEIVED THAT SOLICITATION, TEN OUT OF
2 TEN NEVER LOOKED AT THE SOLICITATION.

3 **THE COURT:** "SO WHAT," I THINK IS THE QUESTION.

4 **MS. STRICKLAND:** WELL, WELL, SO WHAT --

5 **THE COURT:** YES.

6 **MS. STRICKLAND:** -- IS IT'S DIFFICULT TO HAVE A
7 REASONABLE EXPECTATION BASED ON SOMETHING YOU NEVER LOOKED AT.

8 **THE COURT:** WELL, THE PLAINTIFFS HAVE PUT IN EVIDENCE
9 THAT THERE HAVE BEEN MULTIPLE SOLICITATIONS, THAT SOMEBODY SAID
10 THEY WERE -- WHATEVER THEY WERE SHOWN WAS TYPICAL OF WHAT
11 PEOPLE RECEIVED, THAT THEY'VE GONE FORWARD TO MAKE A PRIMA
12 FACIE SHOWING THAT, ESSENTIALLY, ALL THE PLAINTIFFS GOT
13 SOMETHING THAT WAS THE SAME FOR ALL LEGAL PURPOSES.

14 IF YOU FELT THAT THEY WERE NOT SUFFICIENTLY THE SAME
15 AND WOULD GIVE RISE EITHER TO AN OBJECTIVE OR SUBJECTIVE
16 DIFFERENCE OF VIEWPOINT, THEN I THOUGHT THAT SHIFTED THE
17 BURDEN, ESSENTIALLY, TO THE DEFENDANT AFTER THEIR INITIAL
18 SHOWING TO SAY: NO, NO, YOU'RE WRONG, THERE ARE MATERIAL
19 DIFFERENCES.

20 NOW, IF YOUR POINT IS IT DOESN'T MATTER BECAUSE WE'RE
21 GOING TO LOOK AT THE IDIOSYNCRATIC STATE OF MIND OF EACH OF THE
22 CARDHOLDERS, AND THAT'S THE LAW, THAT'S A DIFFERENT ARGUMENT.
23 THAT'S 20 PEOPLE LOOKING AT THE SAME THING AND COMING UP WITH
24 DIFFERENT THOUGHTS.

25 IF THE LAW ACTUALLY DOES LOOK AT THEIR INDIVIDUAL

1 STATES OF MIND, AND THAT'S RELATIVELY RARE IN CONSUMER
2 ACTIONS -- IT MAY WELL BE THE CASE IN AN INDIVIDUAL MATTER,
3 BUT -- IT COULD BE THE CASE, BUT IF THAT IS THE ARGUMENT, THEN
4 THE ARGUMENT IS IT DOESN'T MATTER WHETHER THEY'RE ALL THE SAME
5 BECAUSE PEOPLE ARE DIFFERENT. OKAY?

6 **MS. STRICKLAND:** YOUR HONOR --

7 **THE COURT:** YOUR ARGUMENT IS THAT ESSENTIALLY PEOPLE
8 ARE TREATED THE SAME, AND THEN THE ONLY DIFFERENCE IS DO THEY
9 GET SOMETHING DIFFERENT.

10 **MS. STRICKLAND:** AND, YOUR HONOR, THEY DID, IN FACT,
11 GET SOMETHING DIFFERENT. AND IN THE O'DONNELL DECLARATION
12 WHICH WE DID SUBMIT WITH OUR OPPOSITION, WE HAVE PROVIDED THE
13 COURT WITH A NUMBER OF SAMPLES OF THE DIFFERENT KINDS OF
14 OFFERS. WE SUBMITTED TEN TO YOUR HONOR. THERE ARE OTHERS.

15 **THE COURT:** I LOOKED AT THEM. THEY LOOKED TO BE NOT
16 MATERIALLY DIFFERENT. THAT'S THE POINT. SO IF YOU THINK THAT
17 THEY ARE DIFFERENT, OTHER THAN THEY START WITH "DEAR MADAM" OR
18 "DEAR SIR," OR THE PARAGRAPHS ARE IN DIFFERENT ORDER OR
19 SOMETHING THAT SAID -- I MEAN, THEY'RE TELLING EVERYONE THAT
20 THESE ARE THE GREATEST THINGS SINCE SLICED BREAD. THEY'RE NOT.
21 WHEN I GET THEM, I TEAR THEM UP AND THROW THEM AWAY -- OKAY? --
22 BECAUSE IT'S NOT SOMETHING I WANT TO GET INVOLVED IN TAKING
23 LOANS FROM A CREDIT CARD COMPANY. BUT A LOT OF PEOPLE USE THEM
24 FOR VARIOUS THINGS. AND, AS YOUR CLIENT POINTED OUT, IF YOU'VE
25 GOT A HIGHER INTEREST RATE SOMEWHERE ELSE, THIS WOULD BE A GOOD

1 WAY TO PAY IT OFF AND ESSENTIALLY REFINANCE THAT LOAN. THAT
2 MAY WORK. I HAVEN'T EVER TRIED TO DO THAT.

3 BUT, ANYWAY, SO I THINK THE QUESTION REALLY IS: IF
4 THEY GOT, FOR ALL INTENTS AND PURPOSES, THE SAME PITCH. ALL
5 RIGHT? IT'S THE HOLIDAYS. IT'S A GOOD WAY TO BE ABLE TO BUY
6 CHRISTMAS GIFTS FOR EVERYONE. OR, IF YOU'VE GOT A BIG LOAN,
7 YOU COULD PAY IT OFF BECAUSE THIS IS A GREAT INTEREST RATE.
8 ALL OF THOSE THINGS MAY BE FINE, BUT IF THAT'S WHAT THEY TOLD
9 THEM, WHAT IS IN THAT SOLICITATION REALLY HAS VERY LITTLE TO DO
10 WITH WHAT WE'RE TALKING ABOUT HERE, BECAUSE WHAT WE'RE TALKING
11 ABOUT HERE IS CHASE'S RESERVATION OF A RIGHT TO CHANGE THE
12 PERCENTAGE OF THE OUTSTANDING BALANCE THAT HAS TO BE PAID OFF
13 IN ANY GIVEN MONTH, RIGHT?

14 **MS. STRICKLAND:** WELL, YOUR HONOR, YOU --

15 **THE COURT:** THAT'S NOT THERE. THAT'S IN THE CARD
16 MEMBER AGREEMENT.

17 **MS. STRICKLAND:** WELL, THERE ARE A LOT OF QUESTIONS
18 AND COMMENTS EMBEDDED IN WHAT YOUR HONOR JUST SAID. LET ME TRY
19 TO TACKLE THEM ONE BY ONE.

20 **THE COURT:** OKAY.

21 **MS. STRICKLAND:** WITH RESPECT TO WHAT ARE WE LOOKING
22 AT HERE, YOUR HONOR HAS ALREADY RULED THAT CHASE HAD THE RIGHT
23 UNDER THE CHANGE OF TERMS. SO, I WOULD SUBMIT THAT THAT'S
24 ACTUALLY NOT WHAT WE'RE LOOKING AT HERE. WHAT WE'RE LOOKING AT
25 NOW IS THIS NOTION OF A BREACH OF AN IMPLIED COVENANT WHICH

1 TURNS ON CONSUMER EXPECTATIONS, WHICH THEN GOES BACK TO HOW ARE
2 THOSE EXPECTATIONS FORMED, WHICH THE PLAINTIFFS ALLEGE IN THEIR
3 OWN COMPLAINT WAS BASED ON THE SOLICITATIONS, AND SPECIFICALLY
4 THE FORM OF SOLICITATION THEY APPENDED AS AN EXHIBIT. SO I
5 DON'T ACTUALLY THINK WE'RE HERE TODAY TALKING ABOUT AN --
6 EXPECTATIONS FORMED FROM A CHANGE IN TERMS NOTICE.

7 YOUR HONOR HAS ALREADY SAID YOU HAD THE RIGHT TO
8 CHANGE TERMS AS A CONTRACTUAL MATTER. BUT THE QUESTION IS:
9 DID YOU HAVE A RIGHT TO CHANGE TERMS AS A BREACH OF THE IMPLIED
10 COVENANT AND GOOD FAITH MATTER?

11 **THE COURT:** YES. RIGHT.

12 **MS. STRICKLAND:** SO WE'RE NOT HERE ON THAT PIECE OF
13 THE CONTRACT TODAY. WE'RE HERE ON WHAT IS THE TEST FOR THE
14 BREACH OF THE IMPLIED COVENANT CLAIM UNDER DELAWARE LAW AND CAN
15 THAT CLAIM BE CERTIFIED, WHICH TURNS ON CONSUMER EXPECTATIONS,
16 WHICH GOES BACK TO WHAT'S THE DIFFERENCES WHICH I'M HAPPY TO
17 ADDRESS.

18 **THE COURT:** OKAY. THE SOLICITATION INCORPORATES BY
19 REFERENCE THE CARD MEMBER AGREEMENT, RIGHT?

20 **MS. STRICKLAND:** CORRECT.

21 **THE COURT:** AND WHAT THE CARD MEMBER AGREEMENT SAYS
22 IS: WE CAN CHANGE THE TERMS. AND THE TERM THAT WAS CHANGED
23 HERE WAS THE PERCENTAGE OF THE OUTSTANDING BALANCE THAT HAD TO
24 BE PAID OFF. AND TO THE EXTENT THAT SOMEONE GOT ONE OF THESE
25 SOLICITATIONS, HOW DID THAT BEAR ON HOW THEY WOULD VIEW THAT

1 INCORPORATION AND HOW IT WOULD BE EXERCISED, SO TO SPEAK.

2 LET'S ASSUME FOR A MOMENT, BECAUSE NOBODY'S YET DONE
3 IT, THAT THERE ARE NO MATERIAL DIFFERENCES IN THE
4 SOLICITATIONS, THEN WE WOULD BE BACK TO THE QUESTION OF WHAT
5 YOU INTERPRET DELAWARE LAW TO BE, WHICH IS A FOCUS ON THE
6 INDIVIDUAL STATE OF MIND OF EACH CARD MEMBER WHO RECEIVED A
7 SATISFIED SOLICITATION AND WHAT THEY THOUGHT. IF THAT'S
8 CORRECT, IF YOU ARE CORRECT, THEN YOU WOULD HAVE MILLIONS OF
9 DIFFERENT STATES OF MIND, AND THAT WOULD BE A VERY HARD CLASS
10 TO CERTIFY. THERE IS NO QUESTION ABOUT IT.

11 IF THAT STARTING PREMISE IS NOT CORRECT, THEN WE'RE
12 REALLY LOOKING AT EVERYONE GETTING PRETTY MUCH THE SAME THING,
13 AND THEN YOU START FOCUSING ON BUT YOUR DAMAGES ARE DIFFERENT.
14 I DON'T KNOW. OKAY. SO I REALLY THINK THAT THE ISSUE IS THE
15 RELEVANCE OF THE CASE THAT YOU'VE CITED TO THIS PARTICULAR
16 ACTION.

17 MAYBE I OUGHT TO HEAR FROM MS. CABRASER TO SEE WHAT
18 SHE SAYS ABOUT THAT, OR WHOEVER IS GOING TO ARGUE THAT POINT.

19 **MS. STRICKLAND:** MAY I JUST RESPOND TO YOUR POINT
20 ABOUT THE OBJECTIVE STANDARD? YOUR HONOR, WE WOULD SUBMIT THAT
21 WE PREVAIL EVEN IF THE STANDARD WERE OBJECTIVE, BECAUSE HOW DO
22 YOU GO ABOUT DETERMINING WHAT AN OBJECTIVE EXPECTATION IS?

23 THE ANSWER IS: YOU GO OUT AND YOU TALK TO A BUNCH OF
24 PEOPLE AND SEE IF THERE'S SOME COMMON GROUND THERE TO COME UP
25 WITH WHAT'S REASONABLE. THIS IS EXACTLY THE POINT OF CLASS

1 CERTIFICATION JURISPRUDENCE, WHICH IS THE PLAINTIFFS HAVE TO
2 STEP FORWARD AND SAY HOW ARE THEY GOING TO PROVE THAT THERE IS
3 A SHARED POINT OF VIEW AMONG THEIR CLASS.

4 **THE COURT:** LET ME STOP YOU FOR A MOMENT.

5 ORDINARILY, CONTRACT INTERPRETATION IS A MATTER OF
6 LAW AS TO WHAT WOULD BE A REASONABLE EXPECTATION OF THE
7 PARTICIPANTS OR THE PARTIES TO THE AGREEMENT BASED ON WHAT IS
8 EXPRESSED, NOT WHAT IS HARBORED SILENTLY IN SOMEONE'S STATE OF
9 MIND, AND THERE ARE VARIOUS WAYS THAT THAT CAN BE APPROACHED:
10 WHAT WERE THE NEGOTIATIONS? WELL, OF COURSE, WE DON'T HAVE ANY
11 NEGOTIATIONS HERE. WHAT WAS SAID AT THE TIME BETWEEN THE
12 PARTIES? WHAT WE HAVE IS THE SOLICITATION LETTER AND THE CARD
13 MEMBER AGREEMENT.

14 I DON'T KNOW WHETHER ANY OF THESE SURVEYS ARE
15 TERRIBLY RELEVANT TO THE ISSUE IF ONE IS LOOKING, ESSENTIALLY,
16 AT THE TRADITIONAL CONTRACT ANALYSIS OR METHOD OF CONSTRUING A
17 CONTRACT. BUT THERE ARE THINGS IN ANY GIVEN INDUSTRY OR
18 SITUATION THAT MAY NOT BE SOMETHING THE COURT WOULD KNOW ABOUT.

19 MAYBE I'LL JUST SORT OF SEGUE INTO THIS QUESTION, THE
20 EXPERTISE OF PLAINTIFFS' EXPERT. YOU ARE OBJECTING TO THE WAY
21 HE DID HIS STUDY AND EVERYTHING ELSE.

22 EVEN A CONTRACT THAT'S PATENTLY CLEAR ON ITS FACE MAY
23 BE SHOWN TO BE AMBIGUOUS IF SOMEBODY CAN SHOW THAT THE WAY A
24 PARTICULAR INDUSTRY WORKS, THINGS ARE READ OR CONSIDERED IN A
25 DIFFERENT WAY THAN A LAY PERSON MIGHT READ OR CONSIDER THEM.

1 THERE ARE THINGS HERE ABOUT THE WAY THE BANKING
2 INDUSTRY WORKS THAT ARE BEING RELIED ON BY THE PLAINTIFF, AND
3 THEN STATING THAT THE REASONABLE CONSUMER WOULD ASSUME THESE
4 THINGS EITHER -- I GUESS CONSCIOUSLY OR SUBCONSCIOUSLY, HOWEVER
5 YOU WANT TO PUT THAT. IF ALL THE INTEREST RATES ARE GOING UP
6 AND DOWN AT THE SAME LEVEL BASED ON SOME ECONOMIC PRINCIPLE,
7 THAT MIGHT BE SOMETHING SOMEONE MIGHT HAVE IN THEIR MIND OR
8 JUST HAVE ABSORBED FROM THEIR EXPERIENCE IN THE WORLD.

9 THERE ARE A LOT OF DIFFERENT THINGS THAT SOMEBODY
10 COULD PUT IN AS TO HOW THE INDUSTRY WORKS, BUT NOT NECESSARILY
11 BE ABLE TO DRAW A CONCLUSION AS AN EXPERT. IN OTHER WORDS, YOU
12 MIGHT STILL THEN GET DOWN TO WHAT WOULD A LAY PERSON WOULD DO
13 WITH THAT INFORMATION AND IN DRAWING A LAY OPINION.

14 I'M NOT SURE ALL WHERE THAT WOULD PLAY OUT, BUT IT
15 MAY BE NOBODY HAS ANY EXPECTATION. IT'S PERFECTLY FINE TO JUST
16 CHANGE THESE THINGS AS ONE WISHES. OR IT MAY BE THAT THERE ARE
17 SOME REASONABLE LIMITATIONS ON IT. THAT WOULD BE SOMETHING THE
18 PLAINTIFF WOULD HAVE TO SHOW.

19 BUT IT SOUNDS, AT LEAST IN THE FIRST INSTANCE, TO ME,
20 LIKE THIS IS GOING TO BE SHOWN ON BEHALF OF A CLASS WHO'S
21 EITHER GOING TO RISE OR FALL AS A GROUP UNLESS YOU'RE RIGHT
22 ABOUT HAVING TO LOOK AT THE INDIVIDUAL'S STATES OF MIND OF THE
23 PARTIES TO THIS AGREEMENT. AND IF YOU'RE RIGHT, THAT'S THE END
24 OF IT. BUT IF THAT ISN'T CONTROLLING CASE LAW, THEN IT WOULD
25 SEEM TO ME THAT YOU WOULD BE LOOKING AT THE CLASS'S OBJECTIVELY

1 REASONABLE INTERPRETATION OF SIMILAR SOLICITATIONS IN
2 CONNECTION WITH THE CARD MEMBER AGREEMENT. MAYBE I'M WRONG
3 ABOUT --

4 **MS. STRICKLAND:** YOUR HONOR, MAY I, JUST TO MAKE SURE
5 I RESPOND TO YOUR FIRST QUESTION, DEAL WITH THE ISSUE AND IN
6 THE DIFFERENCES BETWEEN THE OFFERS? THOSE OFFERS ARE ATTACHED
7 AS EXHIBIT B-1 THROUGH TEN TO MR.--

8 **THE COURT:** I LOOKED AT THEM.

9 **MS. STRICKLAND:** MAY I POINT OUT THE DIFFERENCES?

10 **THE COURT:** I COULD HAVE USED A MAGNIFYING GLASS FOR
11 SOME OF THE TEXT. BUT ALL RIGHT.

12 **MS. STRICKLAND:** THAT IS THE PROBLEM OF COPYING FROM
13 OLD MICROFICHE AND THE LIKE. THEY ARE MUCH BIGGER WHEN YOU GET
14 THEM IN REAL LIFE.

15 SOME OF THE OFFERS CONTAIN THE LANGUAGE, QUOTE, "GIVE
16 YOURSELF SOME BREATHING ROOM." THAT'S SOMETHING ONLY ONE OF
17 THE NAMED PLAINTIFFS HERE RECEIVED, AND SHE DID NOT THINK IT
18 WAS MATERIAL TO HER DECISION MAKING.

19 SOME OF THE OFFERS DIFFER DRAMATICALLY IN TERMS OF
20 WHAT THEY PROPOSE THAT THE MONEY BE USED FOR. AND THIS REALLY
21 GOES TO THE HEART OF PLAINTIFFS' CASE, BECAUSE PLAINTIFFS'
22 THEORY IS THAT THIS IS LIKE A HOME EQUITY LOAN, OR AUTO LOAN,
23 WHERE YOU THINK YOU ARE GOING TO HAVE IT FOR A VERY, VERY LONG
24 TIME.

25 WELL, LET ME TELL YOU SOME OF THE THINGS THAT ARE

1 PROPOSED THAT VARY FROM OFFER TO OFFER. FOR EXAMPLE --

2 **THE COURT:** OKAY. WAIT A MINUTE. WHY DIDN'T YOU
3 TELL ME THIS EARLIER, INSTEAD OF TELLING ME IN THE FIRST
4 INSTANCE? IT WOULD HAVE HELPED FOR ME TO HAVE LOOKED AT THIS
5 IN ADVANCE. IT SEEMS LIKE IT WAS AN ISSUE YOU KNEW ABOUT
6 BECAUSE YOU SAID: LOOK AT ALL THESE OFFERS.

7 SO I LOOKED AT THEM. I SAID, YEAH, OKAY, THEY LOOK
8 PRETTY MUCH THE SAME. NOW YOU ARE GOING TO POINT OUT WHERE
9 THEY'RE DIFFERENT, SO I'M GOING TO HAVE TO GET THEM OUT, PUT
10 THEM ALL IN FRONT OF ME, TRY AND FIND WHERE ALL THESE
11 DIFFERENCES ARE. NOW, ONE YOU'RE SAYING, "GIVE YOURSELF SOME
12 BREATHING ROOM," DO YOU THINK THAT'S SIGNIFICANT? APPARENTLY,
13 YOU SAY THE CARD MEMBER DIDN'T THINK THAT WAS IMPORTANT TO
14 THEM.

15 **MS. STRICKLAND:** YOUR HONOR, PLAINTIFFS THINK IT'S
16 VERY IMPORTANT. THAT'S WHAT THEIR CASE IS ALL ABOUT, IS THAT
17 THIS SOMEHOW SUGGESTS THIS LOAN COULD BE OUTSTANDING FOREVER.
18 SO PLAINTIFFS APPARENTLY THINK IT'S IMPORTANT. OKAY?

19 IN B-2 -- AND I'M TALKING ABOUT THE DIFFERENT USES
20 THAT ARE PROPOSED. I MEAN, PLAINTIFFS HERE, THE CENTERPIECE OF
21 THEIR CASE IS THAT THIS WAS JUST LIKE A HOME IMPROVEMENT LOAN
22 OR A VERY LONG-TERM LOAN. BUT THAT'S NOT ACTUALLY WHAT THESE
23 OFFERS SAY. IN FACT, ONLY ABOUT --

24 **THE COURT:** THAT GOES TO THE MERITS OF WHETHER
25 THEY'VE GOT A GOOD CLAIM OR NOT.

1 **MS. STRICKLAND:** IT GOES TO THE DIFFERENCES IN THE
2 SOLICITATIONS.

3 **THE COURT:** WELL, YOU HAVE NOT POINTED THOSE OUT.
4 YOU'VE POINTED OUT ONE PHRASE WHICH YOU SAY, "GIVE YOURSELF
5 SOME BREATHING ROOM," IS IN ONE SOLICITATION WHICH YOU THEN SAY
6 THE PLAINTIFFS ARE RELYING ON, BUT ONLY ONE PLAINTIFF GOT IT,
7 AND THEY DIDN'T THINK IT WAS IMPORTANT. NOW, WHETHER THEY
8 THOUGHT IT WAS IMPORTANT OR NOT GOES TO THE MERITS. ALL RIGHT?

9 IF THE PLAINTIFFS' COUNSEL IS ASSERTING IT'S
10 IMPORTANT AND IT'S ONLY IN ONE AGREEMENT, THAT MIGHT BE A
11 PROBLEM. I CAN ASK MS. CABRASER ABOUT THEM.

12 **MS. STRICKLAND:** IN B-2, WHICH IS ONE OF THE
13 SOLICITATIONS THAT IS IN THE RECORD, O'DONNELL B-2 --

14 **THE COURT:** OKAY.

15 **MS. STRICKLAND:** AGAIN, I'M GOING TO THE POINT OF
16 DIFFERENCES. THAT SOLICITATION REFERS TO FLEXIBILITY WHEN YOU
17 MANAGE YOUR FINANCES. B-3 REFERS TO BUYING A NEW COMPUTER.
18 AND THAT -- WHO EXPECTS TO PAY A LOAN FOR 20 YEARS TO BUY A
19 COMPUTER?

20 B-4 -- B-3 ALSO TALKS ABOUT BUYING NEW FURNITURE.
21 B-4 TALKS ABOUT REVAMPING YOUR WARDROBE. AGAIN --

22 **THE COURT:** LET ME SEE IF I'VE GOT YOUR POINT,
23 THOUGH. ALL RIGHT?

24 YOU'VE NOW CATALOGED THEY'VE USED DIFFERENT TYPES OF
25 EXAMPLES OF THINGS YOU COULD BUY WITH THE CHECKS. OKAY. AND

1 THEN YOU WOULD DRAW FROM THAT WHAT CONCLUSION WITH RESPECT TO
2 THE CLASS AS DIFFERENCES, AS OPPOSED TO -- EACH TIME I THINK
3 YOU'RE SAYING, WELL, WHY WOULD ANYBODY THINK THIS WAS LONG
4 TERM, THESE ARE ALL SHORT-TERM PURCHASES. BUT THEN, AGAIN,
5 THAT'S THE PLAINTIFFS' POINT: WE'RE ALL IN THE SAME BOAT. YOU
6 SAY IT'S A LEAKY ONE, AND THAT'S ON THE MERITS.

7 **MS. STRICKLAND:** BUT ONLY FOUR OF THEM ACTUALLY
8 PROVIDE FOR HOME IMPROVEMENTS, WHICH IS WHAT THEIR CASE IS
9 ABOUT, WHICH, ARGUABLY, IS A DIFFERENT CREATURE, AND CERTAINLY
10 PLAINTIFFS THINK IT'S A DIFFERENT CREATURE. THEY DIDN'T --
11 THIS CASE FOR THEM DOESN'T TURN ON WHETHER YOU ARE SOLICITED TO
12 BUY A NEW COMPUTER AND TAKE OUT A LOAN, OR BUY A NEW WARDROBE,
13 WHICH CERTAINLY IS NOT A LONG-TERM PROPOSITION.

14 THEIR CASE TURNS ON HOME IMPROVEMENTS. FOUR OF THE
15 TEN SAMPLES HAD THAT IN WHAT WE GAVE YOUR HONOR. SIX OF THEM
16 DO NOT. SIX OF THEM ARE MORE MUCH SHORT-TERM FOCUS AND THE
17 LIKE. THAT IS A MATERIAL DIFFERENCE BETWEEN THE OFFERS.

18 **THE COURT:** ALL RIGHT. SO YOU DIDN'T ARGUE THAT
19 BEFORE, BUT WHAT YOU'RE ARGUING NOW IS THAT THE PLAINTIFFS ARE
20 TAKING A PARTICULAR POSITION. I HAVE TO ASK THEM IF THEY ARE
21 AND WHERE THAT'S REFLECTED. IF YOU KNOW WHERE IT'S REFLECTED,
22 YOU CAN SHOW ME AS WELL, THAT THE EXPECTATION OF THE CLASS IS
23 THAT THESE WILL BE THINGS THAT HAVE TO BE PAID OFF OVER A LONG
24 PERIOD OF TIME? IS THAT RIGHT?

25 **MS. STRICKLAND:** THAT'S THEIR ALLEGATION.

1 **THE COURT:** ALL RIGHT. I'LL FIND OUT HOW THAT THEN
2 JUXTAPOSES WITH WHAT YOU'VE POINTED OUT TO BE A SOLICITATION
3 THAT EMPHASIZES SMALLER PURCHASES THAT WOULD BE PAID OFF MORE
4 QUICKLY.

5 **MS. STRICKLAND:** RIGHT. AND YOUR HONOR --

6 **THE COURT:** ALL RIGHT.

7 **MS. STRICKLAND:** WE THINK THE THOROGOOD CASE --
8 THERE'S NOT A LOT OF CIRCUIT CASE LAW THAT WE THINK IS
9 PARTICULARLY ON POINT HERE. THERE'S CERTAINLY CIRCUIT CASE LAW
10 THAT PROVIDES GUIDANCE. BUT THE THOROGOOD CASE, WHICH IS A
11 2010 DECISION FROM THE SEVENTH CIRCUIT, CONTRARY TO THE WAY
12 PLAINTIFFS CHARACTERIZE THE CASE LAW, THOROGOOD ACTUALLY
13 INVOLVED, ESSENTIALLY, IDENTICAL REPRESENTATIONS, WHICH WE
14 DON'T EVEN THINK WE HAVE HERE, BUT ASSUMING THE COURT WERE TO
15 SAY SHORT TERM VERSUS LONG TERM, THESE AREN'T MATERIALLY
16 DIFFERENT, THOROGOOD, THE COURT CONCLUDED A CLASS COULDN'T BE
17 CERTIFIED, A CONSUMER CASE.

18 **THE COURT:** TRUE. ALL RIGHT. WELL, WE CAN ASK
19 MS. CABRASER --

20 **MS. STRICKLAND:** BECAUSE OF DIFFERING EXPECTATIONS.

21 **THE COURT:** OKAY. ON LABELS AND ADVERTISING, RIGHT?

22 **MS. STRICKLAND:** LABELS AND ADVERTISING, BUT VERY
23 SIMILAR. WE'RE DEALING HERE WITH, ESSENTIALLY, PROMOTIONAL
24 MATERIALS IS THE WAY PLAINTIFFS ARE NOW FRAMING THEIR
25 COMPLAINT. WE WON ON THE CONTRACT ISSUE.

1 **THE COURT:** AS I SAY, THE QUESTION NOW IS WHETHER
2 THAT PARTICULAR PROVISION WAS -- RIGHT WAS EXERCISED IN
3 ACCORDANCE WITH THE COVENANT. BUT -- OKAY, NOW I UNDERSTAND
4 YOUR POINT. THERE ARE SOME POINTS YOU MADE. THOSE ARE GOOD
5 POINTS. WE'LL SEE WHAT MS. CABRASER HAS TO SAY IN RESPONSE TO
6 THAT.

7 **MS. STRICKLAND:** YOUR HONOR, I KNOW THAT WAS A LONG
8 RESPONSE TO A SHORT QUESTION, BUT I'LL RESERVE MY FURTHER
9 RESPONSES TO YOUR QUESTIONS.

10 **THE COURT:** OKAY. ALL RIGHT. SOMEWHERE LONG AGO I
11 ASKED: ARE THERE MATERIAL DIFFERENCES? THERE WAS THEN A MORE,
12 SHALL WE SAY, BROADER REACHING ARGUMENT THAT THEN ULTIMATELY
13 POINTED OUT DIFFERENCES THAT DEFENDANT'S COUNSEL FEELS ARE
14 RELEVANT TO THE PLAINTIFFS' THEORY OF LIABILITY.

15 AND SO I THINK THAT WOULD BE HELPFUL FOR YOU TO
16 ADDRESS, MS. CABRASER, AND ALSO TO ADDRESS THE NEMEC CASE, IF
17 YOU WOULD, AND THOROGOOD, BOTH OF WHICH WERE FOCUSED ON, IF YOU
18 WILL, BY DEFENSE COUNSEL. OKAY?

19 SO WHERE DO YOU WANT TO START IN RESPONDING TO
20 MS. STRICKLAND?

21 **MS. CABRASER:** I'LL TRY TO START AT A LOGICAL
22 BEGINNING AND TRY TO GET IT ALL IN, BUT I THINK, FIRST OF ALL,
23 JUST AS A FRAMING MECHANISM, ALTHOUGH BOTH SIDES ACKNOWLEDGE
24 THAT THIS IS A DELAWARE LAW CASE AND DELAWARE LAW WILL CONTROL,
25 AND, IN FACT, THE JURY INSTRUCTIONS WILL BE TAKEN FROM THE

1 DELAWARE CASE LAW -- I KNOW YOUR HONOR DELINEATED THE ELEMENTS
2 OF THE BREACH OF COVENANT CLAIM UNDER DELAWARE LAW IN YOUR
3 ORDER ON THE MOTIONS TO DISMISS. WE ARE ALL BASICALLY
4 FAMILIAR, BUT WE HAVE A PROFOUND DIVIDE, A DIFFERENCE OF
5 OPINION BETWEEN PLAINTIFFS AND DEFENDANTS, AS TO WHAT DELAWARE
6 LAW REQUIRES IN THIS CASE, WHAT THE ELEMENTS ARE AND HOW THEY
7 ARE TO BE PROVED.

8 **THE COURT:** JUST ONE THING, THOUGH. FOR CLASS
9 CERTIFICATION, ARE WE LOOKING AT NINTH CIRCUIT LAW HERE?

10 **MS. CABRASER:** WE ARE LOOKING ABSOLUTELY AT THE NINTH
11 CIRCUIT LAW ON HOW PLAINTIFFS MEET THEIR TASK OF FULFILLING THE
12 APPLICABLE CRITERIA OF RULE 23. ABSOLUTELY RIGHT. THE NINTH
13 CIRCUIT PREVAILS. SO WHAT THE NINTH CIRCUIT SAYS ON
14 PREDOMINANCE IN YOKOYAMA AND HANLON AND RODRIGUEZ, THAT'S THE
15 LAW THAT WE FOLLOW.

16 I WOULD ARGUE THAT UNDER ANY CIRCUIT'S LAW ON
17 PREDOMINANCE OR RULE 23, THIS CLASS WOULD AND SHOULD BE
18 CERTIFIED. BUT, NONETHELESS, WE'RE FOCUSING ON NINTH CIRCUIT
19 LAW FOR PREDOMINANCE BECAUSE NINTH CIRCUIT LAW FOCUSED ON THE
20 LIABILITY ISSUES IN TERMS OF PREDOMINANCE. IF COMMON ISSUES
21 PREDOMINATE AS TO LIABILITY, THE CLASS IS CERTIFIED UNDER RULE
22 23(B)(3). IF DAMAGES CAN BE DETERMINED ON A CLASSWIDE BASIS OR
23 USING A COMMON METHODOLOGY OR FORMULA, AS WE SUBMIT THEY CAN
24 HERE, SO MUCH THE BETTER. IF THEY CAN'T, IT ISN'T FATAL TO
25 CLASS CERTIFICATION.

1 I THINK WE REALLY DON'T HAVE THAT ISSUE HERE, BECAUSE
2 UNLIKE THE LATE-SUBMITTED DELAWARE CASE, WHICH HAD MANY LEVELS
3 OF DIFFICULTY AND MANY GAPS ON THE DAMAGES SIDE OF THE CASE, WE
4 KNOW THAT ALL THE DATA WE NEED TO CALCULATE DAMAGES FOR EACH
5 AND EVERY CLASS MEMBER ON WHATEVER METHODOLOGY OF DAMAGES THE
6 JURY ACCEPTS. THOSE CALCULATIONS CAN BE DONE IN AN INSTANT.
7 INDEED, CHASE ALREADY HAS ALREADY DONE THEM TO SELECT THE CLASS
8 MEMBERS.

9 **THE COURT:** OKAY. LET'S NOT TALK ABOUT THE DAMAGES
10 RIGHT NOW.

11 **MS. CABRASER:** ALL RIGHT.

12 **THE COURT:** I JUST HAPPENED TO BRING IT UP BECAUSE IT
13 WAS FILED RECENTLY, THAT WAS AN ISSUE.

14 **MS. CABRASER:** YES, ALL RIGHT.

15 **THE COURT:** I WOULD LIKE TO GET BACK TO LIABILITY.

16 **MS. CABRASER:** ALL RIGHT. LET'S GO BACK TO THAT
17 BEGINNING.

18 **THE COURT:** THANK YOU.

19 **MS. CABRASER:** LET'S GO BACK TO WHAT THE IMPLIED
20 COVENANT OF GOOD FAITH AND FAIR DEALING IS UNDER DELAWARE LAW.

21 **THE COURT:** OKAY. HOW ABOUT JUST ADDRESSING, IF WE
22 COULD, THOUGH, IN THAT DISCUSSION, SO THAT WE DON'T GET TOO FAR
23 AFIELD, THE ARGUMENT BY MS. STRICKLAND THAT YOU LOOK AT THE
24 STATE OF MIND OF THE INDIVIDUAL, HOWEVER YOU WANT TO DEFINE
25 OBLIGATION?

1 **MS. CABRASER:** I WOULD ANSWER TO THAT, YOUR HONOR,
2 THAT ONE NEED NOT, SHOULD NOT, AND DOES NOT LOOK AT THE
3 SUBJECTIVE STATE OF MIND OF AN INDIVIDUAL IN DETERMINING
4 WHETHER OR NOT A DEFENDANT IS LIABLE FOR BREACH OF THE IMPLIED
5 COVENANT OF GOOD FAITH AND FAIR DEALING, AND THERE ARE A NUMBER
6 OF REASONS FOR THAT. THEY'RE ALL RELATED. EACH OF THEM IS A
7 LITTLE BIT DIFFERENT.

8 FIRST OF ALL, AND IN THIS CASE THIS IS PARTICULARLY
9 STRONG, WE'RE NOT DEALING WITH PARTIES WHO BARGAINED FOR A
10 CONTRACT AND WHO EACH DID SOMETHING. WE'RE NOT DEALING WITH
11 CROSS CLAIMS THAT EACH SIDE WAS UNREASONABLE OR CHANGED THE
12 TERMS OR DIDN'T WANT TO COMPLY WITH THE TERMS.

13 REMEMBER, THIS CLASS IS DEFINED AS PEOPLE WHO WERE IN
14 COMPLIANCE WITH THE LOL TERMS. THEY WERE MAKING THEIR PAYMENTS
15 TIMELY. THEY WERE KEEPING THAT LOW MINIMUM PAYMENT. THEY WERE
16 KEEPING THAT LOW APR AND THEY WERE DOING SO RELIGIOUSLY, PEOPLE
17 WHO STRAYED FROM THE PATH ARE NOT IN THE CLASS.

18 **THE COURT:** DO YOU HAVE TO SHOW SOME TYPE OF
19 REASONABLE EXPECTATION OF THE CONTRACTING PARTIES?

20 **MS. CABRASER:** WE HAVE TO SHOW THAT CHASE'S CONDUCT
21 WAS UNREASONABLE OR ARBITRARY IN THAT IT FRUSTRATED THE
22 REASONABLE EXPECTATIONS OF THE OTHER PARTY.

23 **THE COURT:** OKAY.

24 **MS. CABRASER:** AND THAT IS THE PRECISE ARTICULATION
25 FROM DELAWARE LAW AND THE WAY THAT'S STATED IS IMPORTANT,

1 BECAUSE WHAT CHASE IS TRYING TO DO -- AND WHAT MS. STRICKLAND
2 VERY ABLY ARGUED TO YOUR HONOR, WAS A BURDEN SHIFT AND AN
3 EMPHASIS SHIFT FROM CHASE TO THE PLAINTIFFS THAT DOES NOT EXIST
4 UNDER DELAWARE LAW.

5 **THE COURT:** WELL, THAT'S WHAT I'M ASKING. IN OTHER
6 WORDS, HER POSITION IS THAT IN DETERMINING WHETHER SOMEONE HAS
7 ACTED ARBITRARILY AND FRUSTRATED THE REASONABLE EXPECTATION OF
8 THE OTHER SIDE, YOU HAVE TO AT LEAST SHOW WHAT THE REASONABLE
9 EXPECTATION WAS. AND SHE SAYS YOU HAVE TO LOOK AT EACH
10 INDIVIDUAL'S EXPECTATION AS AN INDIVIDUAL MATTER AS A
11 SUBJECTIVE MATTER, AND THEN YOU LOOK TO SEE IF THAT'S
12 REASONABLE.

13 **MS. CABRASER:** ALL RIGHT. WELL --

14 **THE COURT:** NOW, A LITTLE BIT LIKE THE IDEA OF
15 INDIVIDUAL RELIANCE IN A FRAUD CASE. ALL RIGHT, SOMETHING OF
16 THAT NATURE.

17 NOW, IS THAT A CORRECT STATEMENT OF THE LAW, IN YOUR
18 VIEW? AND IF YOU DON'T THINK IT IS, WHY ISN'T IT? SHE'S
19 RELYING ON NEMEC FOR HER ARGUMENT.

20 **MS. CABRASER:** IT'S ABSOLUTELY NOT A CORRECT
21 STATEMENT OF THE LAW. AND REFERENCE TO DUNLAP AND NEMEC AND TO
22 THE JOHNSON VERSUS GEICO CASE CERTIFYING A CLASS UNDER THAT
23 SAME DELAWARE LAW DEMONSTRATES THAT THAT IS NOT A CORRECT VIEW
24 OF THE LAW.

25 THE RULE UNDER THE RESTATEMENT OF CONTRACTS, WHICH

1 APPLIES TO THESE CLAIMS, IS THAT ONE EFFECTUATES REASONABLE
2 EXPECTATIONS OF THE AVERAGE MEMBER OF THE PUBLIC WHO ACCEPTS
3 IT.

4 BY THE WAY, THAT WAS JUDGE WHYTE'S RESTATEMENT OF THE
5 RESTATEMENT, WHICH ALSO APPLIES IN DELAWARE, IN THE EWERT
6 VERSUS E-BAY CLASS CERTIFICATION IN THIS DISTRICT.

7 SO WE KNOW AS A RULE OF CONTRACT INTERPRETATION THAT
8 APPLIES DIRECTLY TO BREACH OF THE IMPLIED COVENANT, THAT YOU
9 LOOK AT THE REASONABLE EXPECTATIONS OF THE AVERAGE MEMBER OF
10 THE PUBLIC WHO ACCEPTS IT. WE DON'T DELVE IN, AS THE COURTS
11 SAY, TO INDIVIDUAL EXPECTATIONS.

12 WE LOOK FIRST AT THE CONDUCT OF THE PARTY WHO IS
13 ALLEGED TO BE THE BREACHING PARTY. THAT'S WHAT DUNLAP SAYS.
14 THAT'S WHAT NEMEC SAYS. YOU EVALUATE THAT CONDUCT AGAINST A
15 REASONABLE PERSON STANDARD. THERE'S A REASONABLE PERSON
16 STANDARD ON EACH SIDE OF THE EQUATION HERE. YOU LOOK FIRST AT
17 THE CONDUCT. YOU DETERMINE WHETHER OR NOT THAT IT IS
18 REASONABLE OR UNREASONABLE, WHETHER IT'S FAIR OR WHETHER IT'S
19 ARBITRARY. AND YOU DON'T LOOK AT WHAT WAS IN CHASE'S MIND,
20 ALTHOUGH THAT MAY BE INFORMATIVE AND PROBATIVE.

21 YOU LOOK AT WHAT CHASE DID. IS WHAT CHASE DID
22 REASONABLE? DOES IT -- THEN WHEN YOU GET TO THE: DOES IT
23 VIOLATE THE REASONABLE EXPECTATIONS OF THE PARTY ON THE OTHER
24 SIDE, AGAIN, WHAT A SUBJECTIVE EXPECTATION IS IS IRRELEVANT
25 BECAUSE THE LAW IS NOT GOING TO EFFECTUATE THAT REGARDLESS.

1 THE LAW IS GOING TO EFFECTUATE THE REASONABLE
2 EXPECTATIONS, AND THE WAY UNDER CONTRACTS LAW WE DECIDE
3 REASONABLE EXPECTATIONS, THE WAY A JURY DECIDES IT -- WE DON'T
4 DECIDE IT AS A MATTER OF LAW, AND WE CAN'T DECIDE IT TODAY --
5 BUT THE JURY DECIDES IT BECAUSE THEY USE A REASONABLE PERSON
6 STANDARD, AND IT'S THE SAME STANDARD WHETHER YOU'RE TALKING
7 ABOUT TORT LAW, NEGLIGENCE, WHAT WOULD A REASONABLE PERSON DO,
8 WHETHER YOU'RE TALKING ABOUT CONTRACT LAW DIRECTLY, OR WHETHER
9 YOU'RE TALKING ABOUT THE CONSUMER FRAUD LAW, AS JUDGE SCHROEDER
10 POINTED OUT IN THE YOKOYAMA DECISION.

11 YOU'RE LOOKING AT MATERIALITY. YOU ARE LOOKING AT
12 OBJECTIVE STANDARD. YOU'RE LOOKING AT REASONABLENESS. YOU ARE
13 LOOKING AT THE AVERAGE OF WHAT WOULD THE AVERAGE MEMBER OF THE
14 COMMUNITY EXPECT.

15 NOW, WHAT'S INTERESTING ABOUT THIS CASE IS THAT CHASE
16 IS TRYING TO CHASE A RED HERRING. THIS IS, BY THE WAY, NOT THE
17 HOME IMPROVEMENT LOAN CLASS. THIS IS THE LIFE-OF-THE-LOAN
18 CLASS. AND CHASE CATEGORIZED ALL THESE LOANS AS THE SAME, AND
19 THE SALIENT CHARACTERISTICS OF AN LOL -- IT'S AN UNFORTUNATE
20 ACRONYM, BUT IT'S WHAT CHASE CHOSE -- IS THERE'S A LOW APR. IF
21 YOU MAKE THE PAYMENTS, YOU KEEP THE LOW APR. YOU MAKE THE
22 PAYMENTS BY PAYING THE MINIMUM PAYMENT. EVERYBODY IN THE CLASS
23 KNEW THAT. THAT'S WHAT ALL THE SOLICITATION SAID, HERE'S THE
24 DEAL -- RIGHT? THE DEAL ISN'T IF YOU WANT TO BUY A SWEATER,
25 HERE'S THE LOAN YOU GET. IT'S: IF YOU WANT THIS TYPE OF A

1 LOAN WHERE YOU LOCK IN A LOW APR FOR THE LIFE OF THE LOAN BY
2 MAKING YOUR MINIMUM PAYMENT, NOT LOOKING UP ON OTHER HIGHER
3 DEBT -- THERE'S A VERY CLEAR PATH TO COMPLY WITH THE TERMS OF
4 THIS DEAL.

5 NOT, WHAT'S INTERESTING ABOUT THIS CASE AND WHAT
6 MAKES THIS A STRONGER CASE FOR CLASS CERTIFICATION, EVEN THAN
7 JOHNSON VERSUS GEICO, OR EWERT VERSUS E-BAY, OR THE KILLINGTON
8 THE CASE WHICH WAS CERTIFIED UNDER THE BREACH OF COVENANT LAW
9 OF VERMONT WHICH HAS THE SAME REASONABLE OR JUSTIFIABLE
10 STANDARD HERE, IS THAT IN THIS CASE THERE WAS A CLEAR PATH TO
11 COMPLIANCE. THE CLASS MEMBERS KNEW EXACTLY WHAT THEY NEEDED TO
12 DO, AND THERE'S NO -- IT'S NOT LIKE THOROGOOD. THERE'S NO
13 QUESTION ALL OF THEM DID IT. THAT'S WHY THEY GET CHOSEN BY
14 CHASE FOR THE CHANGE IN TERMS.

15 AND, SO, THE LAW LOOKS AT THE METHODOLOGY OF PROOF OF
16 SOMETHING THAT COULD BE SUBJECTIVE LIKE EXPECTATIONS. NOW, WE
17 KNOW IT'S NOT -- IT'S NOT PARTICULAR EXPECTATIONS OF A
18 PARTICULAR PERSON, BUT THE REASONABLE EXPECTATION OF A
19 REASONABLE PERSON THAT THE LAW -- SO HOW DO WE KNOW --

20 **THE COURT:** ALL RIGHT. SO YOU ARE RELYING ON THE
21 CASES YOU CITED TO ARGUE THAT MS. STRICKLAND IS INCORRECT IN
22 STATING THAT YOU LOOK AT THE SUBJECTIVE INTENT OF THE CARD
23 MEMBER?

24 **MS. CABRASER:** THAT IS CORRECT.

25 **THE COURT:** OKAY. NOW I WILL LOOK AT THAT AGAIN JUST

1 TO MAKE SURE. BUT THAT IS HER KEY POINT: IF YOU HAD TO LOOK
2 AT A MILLION DIFFERENT STATES OF MIND, YOU WOULD NOT HAVE A
3 CLASS ACTION.

4 **MS. CABRASER:** THAT'S RIGHT.

5 **THE COURT:** ALL RIGHT.

6 **MS. CABRASER:** AND THE NEMEC, IF I MIGHT, YOUR HONOR,
7 JUST FOR ONE SECOND, BECAUSE IT IS AN IMPORTANT POINT.

8 **THE COURT:** THAT WAS THE QUESTION.

9 **MS. CABRASER:** I AM NOT GOING TO STRAY.

10 **THE COURT:** WELL, YOU KIND OF STRAYED AROUND FOR A
11 WHILE THERE.

12 **MS. CABRASER:** I THINK WE ARE BOTH WANDERING. IT'S A
13 FASCINATING JOURNEY.

14 **THE COURT:** IS THAT A SUBJECTIVE ANALYSIS OR
15 OBJECTIVE?

16 **MS. CABRASER:** THAT WAS, SO I WILL RESCIND IT.
17 TO KEY FROM -- TO KEY DIRECTLY FROM --

18 **THE COURT:** I MEAN, IT'S INTERESTING. I DON'T KNOW
19 ABOUT FASCINATING. IT'S INTERESTING.

20 **MS. CABRASER:** IT WOULD BE OF INTEREST TO A
21 REASONABLE PERSON.

22 WITH RESPECT TO NEMEC, OKAY?

23 **THE COURT:** GOOD. LET'S GET TO --

24 **MS. CABRASER:** THE PREDOMINANT -- IF YOU LOOK AT THE
25 NEMEC CASE, WHICH BY THE WAY, WAS NOT BROUGHT AS A CLASS

1 ACTION. CLASS QUESTIONS WERE NEVER REACHED IN NEMEC. IT WAS
2 TWO VERY SOPHISTICATED PARTIES TO A CONTRACT.

3 LEAVING ASIDE THOSE DISTINCTIONS, THE KEY QUESTIONS,
4 THE PREDOMINANT QUESTIONS IN NEMEC ARE WHETHER THE DEFENDANT
5 ENGAGED IN, QUOTE, "ARBITRARY OR UNREASONABLE CONDUCT." WAS A
6 LOW FIXED APR A REASONABLY EXPECTED FRUIT OF THE BARGAIN
7 BETWEEN THE CLASS MEMBERS AND CHASE, AND DID CHASE'S CONDUCT
8 PREVENT CLASS MEMBERS FROM RECEIVING THE BENEFITS OF THEIR LOW
9 FIXED APR? THE QUESTION, WHAT WAS IN EACH CLASS MEMBERS'S
10 HEAD, IS NOT A PART OF NEMEC, AND IT'S NOT A PART OF OUR PROOF.

11 THERE'S AN ADDITIONAL BLACK LETTER ADAGE OF DELAWARE
12 LAW WHICH IS REFERRED TO IN NEMEC, AND I APOLOGIZE, YOUR HONOR,
13 THAT WE DID NOT STATE THIS IN EITHER OF OUR BRIEFS, BUT IT IS
14 STATED IN NEMEC, AND, IN FACT, IT'S MENTIONED IN BOTH THE
15 MAJORITY DECISION AND THE DISSENT DECISION, AND IT IS A QUOTE
16 FROM A RECENT DELAWARE CASE, AND THIS IS THE PRINCIPLE:

17 "DELAWARE LAW," QUOTE:

18 "PRESUMES THAT PARTIES NEVER ACCEPT
19 THE RISK THAT THEIR COUNTERPARTIES WILL
20 EXERCISE THEIR CONTRACTUAL DISCRETION IN BAD
21 FAITH."

22 IN OTHER WORDS, WHAT IS THE REASONABLE EXPECTATION
23 THAT DELAWARE LAW PRESUMES EACH MEMBER OF THE CLASS HAS. AND
24 THAT EXPECTATION IS: IF I FOLLOW THE DEAL, IF I ADHERE TO THE
25 TERMS OF THE CONTRACT, THE OTHER SIDE WILL NOT TREAT ME

1 UNFAIRLY.

2 THIS FURTHER QUESTION, THE PIVOTAL QUESTION, THE
3 PREDOMINANT QUESTION, RIGHT BACK INTO CHASE'S COURT IS: WHAT
4 CHASE DID -- WE KNOW WHAT IT WAS. WE'VE GOT ALL THE EVIDENCE:
5 IS WHAT IT DID UNREASONABLE?

6 **THE COURT:** OKAY, BUT THAT, AGAIN, GOES TO THE MERITS
7 OF THE CASE.

8 NOW, LET'S GO BACK TO THE OTHER POINT. YOU HAVE MADE
9 YOUR ARGUMENT WITH RESPECT TO DISTINGUISHING NEMEC.

10 THE OTHER POINT THAT WAS RAISED IS THAT THERE ARE
11 DIFFERENCES IN THE SOLICITATION LETTERS THAT WENT OUT TO THE
12 CARD MEMBERS THAT DIFFERED IN SUCH A WAY THAT IT HAS A
13 SIGNIFICANT BEARING AS AN EVIDENTIARY MATTER ON THE THEORY OF
14 LIABILITY HERE. YOU TOUCHED ON THAT VERY BRIEFLY, AND THEN GOT
15 AWAY FROM IT, AND SO I'M NOT SURE I FOLLOWED EXACTLY WHAT YOU
16 WERE SAYING SOMETIME EARLIER.

17 **MS. CABRASER:** MM-HMM.

18 **THE COURT:** THAT THE ARGUMENT BEING MADE BY CHASE'S
19 COUNSEL IS THAT THE PLAINTIFF HAS A PARTICULAR THEORY THAT IS
20 DEPENDENT UPON A PARTICULAR TYPE OF SOLICITATION BUT THE
21 SOLICITATIONS VARY TOO MUCH TO TREAT THEM AT ALL SAME.

22 **MS. CABRASER:** AND WE DISAGREE WITH EVERY ELEMENT OF
23 THAT STATEMENT.

24 **THE COURT:** OKAY. LET'S START WITH THE PLAINTIFFS'
25 THEORY.

1 **MS. CABRASER:** OUR THEORY IS THAT WE ARE ADDRESSING
2 ONE LOAN THAT IS IDENTICAL IN ITS --

3 **THE COURT:** THAT'S YOUR ARGUMENT. WHAT'S YOUR THEORY
4 OF LIABILITY?

5 **MS. CABRASER:** ALL RIGHT. OUR THEORY OF LIABILITY --

6 **THE COURT:** OKAY.

7 **MS. CABRASER:** -- IS THAT CHASE BREACHED THE COVENANT
8 OF GOOD FAITH AND FAIR DEALING WHEN IT UNILATERALLY IMPOSED A
9 CHANGE IN TERMS ON A MILLION CAREFULLY SELECTED LOL BORROWERS,
10 AND THE CHANGE IN TERMS WAS INTENDED. AND CHASE'S DOCUMENTS
11 ATTACHED TO THE DECLARATION OF ERIC GIBBS DEMONSTRATE THIS.
12 CHASE MADE THAT CHANGE TO INCREASE THE PROFITABILITY OF THOSE
13 LOANS AS A CATEGORY.

14 **THE COURT:** YES.

15 **MS. CABRASER:** CHASE SAID --

16 **THE COURT:** I KNOW WHAT THEY DID. ALL RIGHT. SO
17 THAT'S A QUESTION WHETHER ACTING ARBITRARILY OR NOT -- THEY ARE
18 IN THE MONEY BUSINESS.

19 **MS. CABRASER:** AND IT GOES --

20 **THE COURT:** LEAVE THAT OUT.

21 **MS. CABRASER:** ALL RIGHT.

22 **THE COURT:** THE QUESTION IS AS TO THE EXPECTATION.
23 WHAT MS. STRICKLAND FOCUSED ON WAS, GETTING BACK, AGAIN, TO
24 WHETHER EVERYONE WOULD HAVE THE SAME EXPECTATION, SHE SAYS EVEN
25 IF YOU WANT TO CONCEDE THAT YOU DON'T LOOK TO THE IDIOSYNCRATIC

1 STATE OF MIND OF ANY GIVEN CARD MEMBER AS TO WHAT THEY ACTUALLY
2 THOUGHT, AND THEY DECIDE WHETHER IT'S REASONABLE ON AN
3 OBJECTIVE STANDARD, BUT, RATHER, THAT YOU LOOK -- SHE'S SAYING
4 IF YOU CONCEDE -- OR IF ONE WANTS TO ARGUE THAT YOU'RE LOOKING
5 AT A REASONABLE MAN STANDARD FROM THE BEGINNING AS TO WHAT
6 WOULD BE EXPECTED BY THE AVERAGE CONSUMER, IF YOU WANT TO PUT
7 IT THAT WAY, LOOKING AT THIS, THE MATERIAL, THAT THEY DIDN'T
8 ALL GET THE SAME MATERIAL.

9 SO I THEN SAID: WELL, WHAT'S THE DIFFERENCE, THEY
10 SEEM TO BE VERY SMALL DIFFERENCES? SHE SAID: NOT WHEN YOU
11 LOOK AT WHAT THE THEORY OF LIABILITY IS HERE AND THE ARGUMENT
12 THAT PLAINTIFFS ARE MAKING, AND THEN SHE ENDEAVORED TO
13 CHARACTERIZE THE PLAINTIFFS' ARGUMENT. THAT'S WHAT I WANT TO
14 YOU ADDRESS.

15 MS. CABRASER: WE DISAGREE WITH THAT
16 CHARACTERIZATION.

17 THE COURT: WHAT DO YOU SAY YOUR ARGUMENT IS?

18 MS. CABRASER: AS I SAID BEFORE, THIS IS NOT A HOME
19 LOAN CLASS. THIS IS NOT A CLASS OF PEOPLE WHO ALL DECIDED TO
20 WRITE THEIR CHECK TO MAKE A PARTICULAR TYPE OF PURCHASE. THAT
21 IS CLASS OF PEOPLE WHO TOOK OUT A CHECK LOAN THAT HAD THE SAME
22 TERMS AND CONDITIONS WHEN THEY WROTE THE CHECK.

23 THE COURT: AND THEIR EXPECTATION WAS?

24 MS. CABRASER: AND THEIR EXPECTATION WAS, THEIR
25 UNIFORM EXPECTATION WAS -- IT IS UP TO THE JURY TO DECIDE

1 WHETHER THIS IS REASONABLE OR NOT.

2 **THE COURT:** WHAT ARE YOU ARGUING TO THE JURY THEIR
3 EXPECTATION WAS?

4 **MS. CABRASER:** WE ARE ARGUING TO THE JURY THAT THE
5 EXPECTATION OF EVERY CLASS MEMBER WAS THAT, IF THEY MADE THEIR
6 MONTHLY PAYMENTS ON TIME, IF THEY MADE THEIR MINIMUM MONTHLY
7 PAYMENTS ON TIME, IF THEY ADHERED TO THE TERMS AND CONDITIONS
8 OF THE LOANS AS SET FORTH IN THE SOLICITATION LETTERS, AND THEY
9 ARE ALL IDENTICAL AS TO THAT, AND AS AFFECTED BY THE CARDHOLDER
10 AGREEMENT, AND THEY ARE ALL IDENTICAL AS TO THAT.

11 **THE COURT:** IF THEY MADE TIMELY PAYMENTS, THAT NOBODY
12 WOULD CHANGE THE TERMS?

13 **MS. CABRASER:** YES. IF I MAKE MY PAYMENT ON TIME, I
14 WILL LOCK IN A LOW APR FOR THE LIFE OF THE LOAN.

15 **THE COURT:** OKAY. NOW --

16 **MS. CABRASER:** HENCE, LOL.

17 **THE COURT:** THEN THEY ARE GOING TO POINT TO THE CARD
18 MEMBER AGREEMENT SAYS: YOU DON'T HAVE A REASONABLE
19 EXPECTATION.

20 **MS. CABRASER:** THAT'S A MERITS ISSUE.

21 **THE COURT:** YES, IT IS. YES, IT IS.

22 **MS. CABRASER:** AND, AND DELAWARE LAW PRESUMES THAT
23 YOU DON'T HAVE THE EXPECTATION THAT YOU'RE GOING TO GET BAD
24 FAITH FROM THE OTHER SIDE.

25 **THE COURT:** OKAY. THEN WE HAVE TO DETERMINE WHAT BAD

1 FAITH IS.

2 MS. CABRASER: THAT'S CORRECT.

3 THE COURT: AND THAT GOES BACK TO EXPECTATIONS AND
4 WHY ONE WOULD THINK SOMEBODY --

5 MS. CABRASER: WELL --

6 THE COURT: SO IT SEEMS TO ME, THOUGH, THAT YOU
7 ANSWERED WHATEVER THE CHALLENGE WAS HERE.

8 NOW, IF MS. STRICKLAND WANTS TO POINT OUT YOU CHANGED
9 YOUR TUNE, SHE GOT HER IMPRESSION AS TO WHAT YOUR ARGUMENT WAS
10 AS TO SOMETHING YOU'VE ACTUALLY SAID, SHE CAN POINT THAT OUT TO
11 ME.

12 OTHER THAN THAT, WHAT YOU'RE SAYING IS THAT WHAT THE
13 EXPECTATION IS THAT IF WE DO EVERYTHING RIGHT ON OUR END, YOU
14 ARE NOT GOING TO CHANGE THE TERMS BECAUSE YOU SHOULD BE HAPPY
15 WITH WHAT YOU ARE DOING. THAT'S WHAT YOU GAVE US IN THE FIRST
16 PLACE.

17 MS. CABRASER: THAT'S RIGHT.

18 THE COURT: THAT MAY BE FINE IF THAT IS THE
19 PLAINTIFFS' POSITION. IF MS. STRICKLAND CAN POINT WHERE YOU
20 WERE MAKING DIFFERENT ARGUMENTS ON BEHALF OF PERHAPS
21 DIFFERENTLY SITUATED PEOPLE, SHE CAN DO THAT.

22 OKAY. NOW, I THINK BOTH OF YOU SPENT SOME TIME
23 DISCUSSING AMBIGUOUS TERMS IN CONTRACTS. WHY WOULD THAT BE
24 RELEVANT HERE? THE TERMS SEEM --

25 MS. CABRASER: YOUR HONOR, I --

1 **THE COURT:** THE TERMS OF THE CONTRACT ARE PRETTY
2 STRAIGHTFORWARD.

3 **MS. CABRASER:** I'M NOT SURE THAT THAT IS IMPORTANT.

4 **THE COURT:** OKAY.

5 **MS. CABRASER:** I THINK WHAT'S IMPORTANT IS WHETHER
6 THE CONDUCT AT ISSUE --

7 **THE COURT:** OKAY.

8 **MS. CABRASER:** -- MET THE ARBITRARY OR UNREASONABLE
9 TEST UNDER DELAWARE LAW, AND WE ALL KNOW WHAT THE UNIVERSE OF
10 FACTS AND DOCUMENTS AND POLICIES IS THAT'S GOING TO ATTEND TO
11 THAT. IN FACT, WE HAVE A PRETTY GOOD IDEA FROM THE EXHIBITS
12 WHAT THE TRIAL IS GOING TO LOOK LIKE.

13 **THE COURT:** LET'S GO FOR A MOMENT -- AND I'LL LET YOU
14 START THIS, AND THEN I CAN GET BACK TO MS. STRICKLAND.

15 ON THE QUESTION OF DAMAGES, IT SOUNDED LIKE THE
16 DEFENSE WAS ARGUING: IF YOU LOOK AT EACH INDIVIDUAL MEMBER AND
17 YOU LOOK AT THEIR WHOLE LOAN PORTFOLIO AND FIGURE OUT WHAT THEY
18 DECIDED TO PAY AT VARIOUS TIMES, THAT YOU COULD SET OFF IN ONE
19 WAY OR ANOTHER WHATEVER LOSSES THEY ARGUABLY SUSTAIN BY HAVING
20 TO PAY THINGS OFF AT A FASTER RATE WITH WHATEVER ELSE THEY DID
21 OR GOT IN EXCHANGE, AND I WASN'T SURE THAT THAT REALLY COUNTS
22 IN THE FIRST INSTANCE. THE PLAINTIFFS WOULD, I GATHER, JUST
23 SHOW THAT THEY HAD TO PAY MORE THAN THEY OTHERWISE WOULD HAVE
24 HAD TO PAID AT ANY GIVEN TIME.

25 **MS. CABRASER:** THAT'S RIGHT, YOUR HONOR. WE DON'T

1 THINK IT MATTERS AT ALL. THE DAMAGES THEORIES ARE VERY SIMPLE
2 HERE. THE CLASS MEMBERS ARE SAYING FOR THOSE WHO ACCEPTED, YOU
3 KNOW, UNDER THE HOBSON'S CHOICE CHASE POSED, YOU KNOW, HIGHER
4 APR OR HIGHER MINIMUM PAYMENT, IF YOU ACCEPT THE HIGHER APR,
5 THEN THE DAMAGES THEORY IS YOU ARE ENTITLED TO HAVE YOUR APR
6 RESTORED AND THE EXCESS INTEREST YOU PAID RETURNED. THAT COULD
7 BE DETERMINED FROM CHASE RECORDS, PUSH A BUTTON, IT APPEARS.

8 FOR CLASS MEMBERS WHO DID NOT ACCEPT THAT, THEN THE
9 QUESTION FOR THE JURY IS WHETHER THEY ARE ENTITLED TO ALL OR A
10 PART OF THE UPFRONT FEE THEY PAID FOR THEIR LOANS, AND THERE'S
11 ALSO A KNOWN QUANTUM WITH RESPECT TO EVERY SINGLE CLASS MEMBER.

12 SO UNLIKE THE ALLAPATTAH 11TH CIRCUIT CASE, WHICH WAS
13 CERTIFIED AS A CLASS FOR BREACH OF COVENANT UNDER 35 STATES'
14 LAWS, BECAUSE THOSE ARE ALL THE STATES THAT HAVE, BY THE WAY,
15 THE REASONABLE STANDARD -- WE TOOK A LOOK UNDERNEATH TO SEE IF
16 THERE WAS A SPECIFIC DISCUSSION OF DELAWARE LAW IN ALLAPATTAH.
17 THERE WASN'T, EXCEPT THE COURT SAID: WE LOOKED AT ALL THE
18 STATES' LAWS, WE TOOK OUT OF THE CLASS STATES THAT HAVE A
19 SUBJECTIVE STANDARD.

20 **THE COURT:** SUBJECTIVE?

21 **MS. CABRASER:** SUBJECTIVE THAT APPLIES TO BREACH. IT
22 TURNS OUT THAT WAS LOUISIANA. LOUISIANA HAS A SUBJECTIVE
23 STANDARD. EVERYONE ELSE --

24 **THE COURT:** YOU ARE SAYING DELAWARE WAS IN THAT CASE.

25 **MS. CABRASER:** DELAWARE WAS IN THE CASE, AS WAS

1 VERMONT, AS WERE THE OTHER STATES WE'VE DEALT WITH IN CLASS
2 CERT IN EWERT AND JOHNSON AND KILLINGTON. SO, ALL OR PART OF
3 THE UPFRONT FEES.

4 SO WE DON'T HAVE THIS VAST, SPRAWLING INDIVIDUALIZED
5 ADMINISTRATIVE PROCESS THAT OCCURRED IN ALLAPATTAH WHICH,
6 NONETHELESS, DID NOT DEFEAT CLASS CERTIFICATION.

7 WHAT WE HAVE ARE A METHODOLOGY THAT THE JURY CAN
8 CHOOSE TO ACCEPT OR NOT, A CALCULUS THAT CAN BE MADE UNDER THE
9 METHODOLOGY, A CALCULUS THAT CAN BE MADE EVEN IF THE JURY
10 DECIDES TO ACCEPT A SETOFF ARGUMENT THAT CHASE MIGHT HAVE.

11 CHASE MIGHT SAY, WELL, YOU KNOW, HERE ARE THE
12 CATEGORIES IN WHICH WE ARE ENTITLED TO A SETOFF, BECAUSE
13 SOMEHOW THESE CONSUMERS GOT PART OF THE BENEFIT OF THEIR
14 BARGAIN AND THAT OUGHT TO BE TAKEN INTO ACCOUNT; THEIR -- YOU
15 KNOW, THEIR FEE OUGHT TO BE PRORATED OR SOME SUCH. THEY CAN
16 TAKE THAT DEFENSE.

17 **THE COURT:** IS THAT REALLY A SETOFF?

18 **MS. CABRASER:** YOUR HONOR, IF THEY PERSUADED THE JURY
19 IN THE CONTEXT OF BAD FAITH/GOOD FAITH DECISION ABOUT WHO'S
20 ACTING REASONABLY OR ARBITRARILY, IT MIGHT BE. WE DON'T THINK
21 IT'S LIKELY. WE THINK WHAT'S LIKELY IS IF WE PROVE OUR CASE ON
22 LIABILITY, WE WILL APR'S RESTORED, EXCESS INTEREST RETURNED.
23 WE WILL HAVE INITIAL TRANSACTION FEES RESTORED. THERE ARE MORE
24 COMPLEX CALCULATIONS THAT DEAL WITH LOST VALUE OF THE LOAN.
25 THOSE TYPES OF DAMAGES ARE ALLOWABLE UNDER BREACH OF THE

1 COVENANT. THEY CAN ALSO BE READILY CALCULATED.

2 **THE COURT:** WHAT DO YOU UNDERSTAND THE SETOFF THEORY
3 TO BE?

4 **MS. CABRASER:** WELL, YOUR HONOR, WE ARE -- WE DON'T
5 ACCEPT THE SETOFF THEORY, BUT WE'RE MENTIONING IT BECAUSE IT'S
6 A DEFENSE THAT CHASE MAY WANT TO RAISE. AND THE POINT IS IT IS
7 NOT A DEFENSE THAT IS INDIVIDUALIZED IN THE SENSE THAT IT WOULD
8 DEFEAT CLASS CERTIFICATION. IT'S A DEFENSE THEY WOULD COME IN
9 WITH AT THE DAMAGES PHASE, IF THERE WERE A SEPARATE DAMAGES
10 PHASE.

11 UNDER ALLAPATTAH AND UNDER THE CASES CITED IN
12 YOKOYAMA, IT'S NOT RELEVANT TO CERTIFYING THE CLASS AT THIS
13 INSTANCE.

14 BUT I WANTED TO TAKE A HYPOTHETICAL WHICH IS
15 ACTUALLY --

16 **THE COURT:** WHAT DO YOU UNDERSTAND THEIR SETOFF TO
17 BE, THOUGH, AS THEY ARGUE IT?

18 **MS. CABRASER:** WELL, NOT TO MAKE THEIR ARGUMENT FOR
19 THEM, I THINK WHAT THEY'RE SAYING IS, COINCIDENTALLY OR
20 INADVERTENTLY, BECAUSE OF WHAT CHASE DID TO THE MEMBERS OF THE
21 CLASS, SOME CLASS MEMBERS MAY HAVE GOTTEN SOME BENEFIT OR HAD
22 THEIR DAMAGES REDUCED.

23 **THE COURT:** YES. HOW?

24 **MS. CABRASER:** BY PAYING DOWN -- BY BEING FORCED TO
25 PAY DOWN THEIR LOAN MORE RAPIDLY THAN THEY OTHERWISE WOULD HAVE

1 UNDER THE ORIGINAL CONTRACT.

2 **THE COURT:** WHAT WAS THE SETOFF YOU UNDERSTAND
3 THEY'RE ARGUING? IN OTHER WORDS, THEY PAID IT OFF MORE
4 RAPIDLY? WHAT WAS THE BENEFIT THAT'S BEING SET OFF AGAINST
5 THAT? WHAT DO YOU UNDERSTAND THAT TO BE?

6 **MS. CABRASER:** WE DON'T -- WE DON'T SEE A -- WE DON'T
7 SEE --

8 **THE COURT:** I KNOW YOU DON'T SEE IT, BUT THAT'S THEIR
9 ARGUMENT, THAT YOU PAID IT OFF, SO NOW YOU'RE OUT FROM UNDER
10 YOUR LOAN FASTER. IS THAT THE SO-CALLED SETOFF?

11 **MS. CABRASER:** I THINK THAT'S WHAT THEY'RE SAYING.

12 **THE COURT:** PEOPLE CAN CHOOSE HOW THEY WANT TO PAY
13 OFF THEIR DEBT.

14 **MS. CABRASER:** AND THAT'S OUR POINT.

15 **THE COURT:** OKAY.

16 **MS. CABRASER:** OUR POINT IS PEOPLE CAN CHOOSE AND OUR
17 PEOPLE, OUR CLASS MEMBERS, WEREN'T CHOOSING ARBITRARILY. THEY
18 WERE ACCEPTING AN OFFER CHASE MADE THEM. CHASE MADE THE OFFER:
19 HERE'S HOW YOU CAN DO THIS.

20 **THE COURT:** OKAY. FINE.

21 **MS. CABRASER:** AND THEY SAID YES.

22 **THE COURT:** OKAY. I'LL ASK HER ABOUT HER SETOFF, NOT
23 YOU. THAT'S OKAY.

24 **MS. CABRASER:** ALL RIGHT.

25 **THE COURT:** OKAY. SO I THINK THAT YOU HAVE

1 ADDRESSED, I BELIEVE, WHAT WAS RAISED BY MS. STRICKLAND AS THE
2 PRIMARY POINTS IN FAVOR OF HER ARGUMENT; THE POINTS BEING THAT
3 YOU DO NOT LOOK TO AN OBJECTIVE STATE OF MIND AS A REASONABLE
4 EXPECTATION FOR PURPOSES OF THE COVENANT. THAT WAS HER FIRST
5 POINT. AND THE SECOND WAS THAT, IRRESPECTIVE OF WHETHER YOU
6 DO, THAT THE PLAINTIFF HAD A THEORY AS TO EXPECTATION THAT WAS
7 DEPENDENT UPON THE SOLICITATION LETTERS, AND THAT THE LETTERS
8 WERE SIGNIFICANTLY DIFFERENT AS COMPARED WITH THAT EXPECTATION.

9 YOU HAVE COVERED THOSE POINTS, I BELIEVE.

10 **MS. CABRASER:** WE HAVE.

11 AND WE ALSO MADE THE POINT, AND I THINK IT IS
12 PERTINENT TO THE EXPECTATIONS POINT, THAT -- IT IS A COMMON
13 QUESTION, WHICH WE'RE NOT ANSWERING TODAY, BUT WE THINK IT'S A
14 COMMON QUESTION TO BE ASKED AT TRIAL, WHETHER SOMETHING --
15 WHETHER IT IS REASONABLE TO EXPECT SOMETHING THAT HAS NEVER
16 HAPPENED IN THE PAST TO HAPPEN IN THE FUTURE. IN OTHER WORDS,
17 WE KNOW THAT CHASE'S AND THE INDUSTRY'S MINIMUM MONTHLY
18 PAYMENTS WERE TWO TO TWO-AND-A-HALF PERCENT. CHASE HADN'T
19 RAISED ITS PAYMENT MINIMUMS IN 13 YEARS. AND SO WHEN SOMETHING
20 HAS NEVER HAPPENED IN, YOU KNOW, MEANINGFUL HISTORY, IS IT
21 REASONABLE TO EXPECT THAT THERE IS A REASONABLE EXPECTATIONS
22 THAT IT WILL OCCUR. CERTAINLY, THE CLASS MEMBERS DIDN'T EXPECT
23 THAT. AND IT'S GOING TO BE UP TO THE JURY TO DECIDE UNDER ALL
24 OF THOSE OBJECTIVE FACTS AND CIRCUMSTANCES.

25 **THE COURT:** OKAY. BUT THAT'S ON THE MERITS AGAIN.

1 IN OTHER WORDS, YOU'RE SAYING THAT YOU HAVE -- YOUR
2 ARGUMENT BASED ON WHAT'S A REASONABLE EXPECTATION -- SO FAR
3 YOU'VE TOLD ME TWO THINGS. ONE, THEY DIDN'T EXPECT THE RATE TO
4 CHANGE BECAUSE THEY WERE IN FULL COMPLIANCE, AND SO THEY
5 THOUGHT THINGS WOULD JUST GO ON IN HAPPY PERPETUITY BECAUSE
6 EVERYBODY WAS DOING EVERYTHING THEY NEEDED TO DO AND THEY WERE,
7 FOR LACK OF A BETTER WORD, A GOOD CUSTOMER.

8 NOW, THE OTHER ARGUMENT IS THAT IF NOBODY HAS EVER
9 DONE ANYTHING OF QUITE THIS MAGNITUDE, THEN YOU WOULDN'T EXPECT
10 IT TO HAPPEN WHEN YOU SIGNED UP. AND THOSE ARE TWO ARGUMENTS
11 THAT WOULD BE CLASS-WIDE ARGUMENTS, AS OPPOSED TO FOCUSING ON
12 THE PARTICULAR SOLICITATION.

13 BUT IF YOU'RE USING THE SOLICITATIONS TO SUPPORT
14 EITHER OF THOSE ARGUMENTS, THEN THE QUESTION BECOMES HOW THOSE
15 SOLICITATIONS ARE DIFFERENT ENOUGH THAT THE CASE FOR EACH OF
16 THESE GROUPS THEY'VE GOT, ONE OR THE OTHER OF THE SOLICITATIONS
17 MIGHT BE DIFFERENT, AND THAT WAS WHAT I THINK MS. STRICKLAND
18 WAS TRYING TO POINT OUT.

19 SO, I WOULD ASK YOU, IF YOU ARE USING THESE
20 SOLICITATIONS TO SUPPORT IN A PARTICULAR WAY EITHER OF THOSE
21 ARGUMENTS, HOW THOSE WOULD BE USED BASED ON A CLASS EXPERIENCE,
22 AS OPPOSED TO AN INDIVIDUAL EXPERIENCE, GIVEN THE PARTICULAR
23 LANGUAGE OF WHAT MIGHT HAVE BEEN PROMOTED IN ANY GIVEN
24 SOLICITATION?

25 **MS. CABRASER:** YES.

1 **THE COURT:** DO YOU WANT TO HIT THAT ONCE BEFORE YOU
2 SIT DOWN?

3 **MS. CABRASER:** YES, WE DO. THESE ARE STANDARDIZED
4 SOLICITATIONS IN TERMS OF WHAT THE ESSENTIAL DEAL TERMS ARE,
5 AND THE DEAL TERMS STAY THE SAME THROUGHOUT THE VARIOUS FORMS
6 OF THE LETTER.

7 **THE COURT:** WHAT ABOUT THE EXAMPLES THAT ARE GIVEN
8 FOR PURCHASES, FOR EXAMPLE? THAT'S WHAT MS. STRICKLAND SAYS
9 THAT SHE BELIEVED THAT YOUR ARGUMENT WAS THAT THESE WOULD BE --
10 THAT PEOPLE HAD A REASONABLE EXPECTATION --

11 **MS. CABRASER:** NO.

12 **THE COURT:** -- THEY WOULD BE USED FOR LOANS THAT
13 WOULD TAKE A LONG TIME TO PAY OFF, BUT THEN SOME OF THE
14 EXAMPLES OF HOW THE LOANS COULD BE USED WERE FOR SHORTER-TERM
15 OR, LET'S SAY, SMALLER PURCHASES.

16 **MS. CABRASER:** AND WE DON'T SEE THAT AS MATERIAL. WE
17 DON'T SEE THAT AS A DIFFERENCE, BECAUSE IF THAT WERE TRUE, IF
18 WHAT YOU WERE PURCHASING MATTERED TO THE DEAL, THEN CHASE WOULD
19 HAVE OFFERED DIFFERENT APR'S WHETHER YOU WERE BUYING A SWEATER
20 OR A MAJOR APPLIANCE, YOU KNOW, A MAJOR PURCHASE, AND IT
21 DIDN'T.

22 THESE WERE EXAMPLES OF WHAT YOU COULD USE THE CHECK
23 FOR. THEY WERE ILLUSTRATIONS. BUT THE SOLICITATIONS NEVER
24 SAID: WELL, THIS MONTH FOR PEOPLE THAT WANT TO BUY SWEATERS,
25 WE'RE OFFERING THIS APR AND THESE TERMS, AND THEY DIDN'T HAVE

1 ANOTHER SOLICITATION THAT SAID, FOR PEOPLE WHO NEED A LITTLE
2 EXTRA BREATHING ROOM, WE ARE GOING TO OFFER A DIFFERENT DEAL.

3 SO THE DEAL TERMS DID NOT CHANGE. THE MARKETING
4 ILLUSTRATIONS WERE DIFFERENT, BUT THEY ARE NOT MATERIAL
5 DIFFERENCES WITH RESPECT TO HOW ONE OBJECTIVELY VIEWS THE
6 CONTRACTUAL RELATIONSHIP, THE DEAL TERMS, THE RELATIONSHIP OF
7 THE PARTIES, AND REASONABLENESS ON EITHER SIDE OF THE EQUATION.

8 **THE COURT:** LET'S SAY IT'S THE DEFENSE, IRRESPECTIVE
9 OF WHETHER IT'S YOUR POSITION, ALL RIGHT? AND THE DEFENDANT
10 WANTS TO COME IN AND SAY: WELL, THAT'S ALL WELL AND GOOD WHAT
11 THE PLAINTIFF ANTICIPATED, BUT, LOOK, WE TOLD THEM IN THIS ONE
12 THAT IT WAS SOME SMALL PURCHASE THIS WOULD BE GOOD FOR DURING
13 THE HOLIDAYS OR SOMETHING LIKE THAT. THAT MIGHT BE A STRONGER
14 ARGUMENT THAN IF WHAT THEY PROMOTED IN A DIFFERENT PIECE OF
15 LITERATURE WAS SOMETHING THAT WOULD BE MORE EXPENSIVE AND TAKE
16 LONGER.

17 I WOULD HAVE TO LOOK TO SEE IF THEY ARE REALLY
18 DIFFERENT IN THAT WAY. BUT MAYBE SOMEONE ELSE -- IS IT YOUR
19 UNDERSTANDING THAT ALL OF THESE KIND -- I KIND OF STOPPED
20 MYSELF MID SENTENCE. IS IT YOUR UNDERSTANDING THAT ALL OF
21 THESE PURCHASES THAT WERE SUGGESTED AS EXAMPLES OF WHAT PEOPLE
22 COULD DO WITH THE CHECKS, THAT THOSE PURCHASES WERE SMALL
23 ITEMS?

24 **MS. CABRASER:** I'D TO HAVE LOOK AGAIN AT THEM.

25 **THE COURT:** OKAY.

1 **MS. CABRASER:** I THINK THEY WERE ASSORTED ITEMS.

2 BUT TO ANSWER YOUR QUESTION DIRECTLY: IF CHASE AT
3 TRIAL WERE TO MAKE THAT POINT, THEN OUR RESPONSE WOULD BE THIS:
4 CHASE, LET'S LOOK AT YOUR RECORDS, LET'S LOOK AT YOUR ANALYSES,
5 LET'S LOOK AT YOUR WATERFALL BY WHICH YOU SELECTED THE EXACT
6 INDIVIDUALS THAT WOULD BE SUBJECT TO EACH OF THESE TWO CHANGE
7 IN TERMS, OKAY?

8 CHASE LOOKED AT THOSE TRANSACTIONAL RECORDS. CHASE
9 MADE THE ANALYSIS BEFORE IT PICKED THE PEOPLE AND BEFORE IT DID
10 THE CHANGE IN TERMS. SO BY THE TIME THE CLASS MEMBER GETS THE
11 CHANGE IN TERMS, CHASE ALREADY KNOWS EVERYTHING ABOUT THAT
12 HISTORY, THAT BORROWER'S HISTORY.

13 AND LET'S LOOK AT CHASE'S DOCUMENTS FROM THE TIME,
14 WHICH YOU HAVE --

15 **THE COURT:** OKAY. WHY IS THAT RELEVANT? WHY IS
16 ANYBODY LOOKING AT THAT?

17 **MS. CABRASER:** BECAUSE, BECAUSE, YOUR HONOR, WHEN
18 CHASE WAS DECIDING WHO WAS GOING TO BE IN THIS CLASS, BY
19 DECIDING WHO WAS GOING TO BE TARGETED -- AND THAT'S CHASE'S
20 WORD, NOT MINE.

21 **THE COURT:** I SEE WHERE YOU'RE GOING, BUT I DON'T
22 KNOW IF THAT WORKS.

23 **MS. CABRASER:** THEY DIDN'T LOOK, CHASE DIDN'T LOOK AT
24 WHAT THE PURCHASE WAS.

25 **THE COURT:** NO, NO. I UNDERSTAND. YOU'RE SAYING

1 CHASE LUMPED THEM ALL TOGETHER, SO NOW THEY ARE STUCK WITH THEM
2 AS A CLASS. I UNDERSTAND THAT.

3 BUT IF THE DEFENSES COULD BE MARKEDLY AFFECTED IN A
4 DIFFERENT WAY BY THE SOLICITATION, THEN THAT WOULD BE SOMETHING
5 I DO WANT TO LOOK AT, THE SOLICITATIONS, TO SEE IF THAT WOULD
6 BE THE CASE. SO --

7 **MS. CABRASER:** AND, YOUR HONOR, I THINK WE COULD ALL
8 LOOK FOR A VERY LONG TIME --

9 **THE COURT:** WELL, I AM GOING TO LOOK.

10 **MS. CABRASER:** AT ALL THE SOLICITATIONS.

11 **THE COURT:** AGAIN --

12 **MS. CABRASER:** AND YOU WILL.

13 BUT NO MATTER HOW OFTEN WE LOOK, WHAT WE ARE GOING TO
14 FIND IS THAT WHAT'S IN THE LARGE PRINT AND WHAT IS A CONSTANT
15 THROUGH EVERY SINGLE SOLICITATION IS THAT THIS IS AN OFFER OF A
16 LOAN, A CHECK LOAN, FOR A LOW FIXED APR AT A TWO PERCENT
17 MINIMUM PAYMENT, AND THAT IS GOOD FOR THE LIFE OF THE LOAN, AND
18 IT DOESN'T MATTER HOW QUICKLY OR OVER WHAT PERIOD OF TIME THE
19 CUSTOMER CHOOSES TO PAY FOR IT.

20 **THE COURT:** ALL RIGHT. I'M GOING TO GO BACK --

21 **MS. CABRASER:** IT'S ALWAYS TRUE.

22 **THE COURT:** I AM GOING TO GO BACK, LET MS. STRICKLAND
23 HAVE HER RESPONSE, AND THEN I'M PROBABLY GOING TO TAKE IT UNDER
24 SUBMISSION AT THAT POINT. I AM NOT GOING TO RULE TODAY ON
25 THIS. OKAY.

1 **MS. CABRASER:** ALL RIGHT.

2 **THE COURT:** I WANT TO GIVE HER A CHANCE, NOW THAT
3 SHE'S HEARD YOUR ARGUMENT, AND I THINK I UNDERSTAND WHERE SHE'S
4 COMING FROM -- I DON'T KNOW IF THIS IS GOING TO WORK FOR HER,
5 BUT I WANT TO HEAR HER LAST POINT ON THIS.

6 **MS. CABRASER:** YOUR HONOR, WOULD IT BE POSSIBLE TO
7 MAKE A BRIEF REPLY?

8 **THE COURT:** DEPENDS.

9 **MS. CABRASER:** THANK YOU.

10 **MS. STRICKLAND:** YOUR HONOR, I HEARD MS. CABRASER
11 ARTICULATE HER CASE, BUT I ACTUALLY HAVE THE BENEFIT OF THE
12 COMPLAINT IN FRONT OF ME, WHICH IS A DIFFERENT ARTICULATION OF
13 THE CASE THAN THAT WHICH WAS JUST PRESENTED TO YOU.

14 **THE COURT:** WHICH PAGE ARE YOU ON?

15 **MS. STRICKLAND:** YOUR HONOR, THIS IS ACTUALLY
16 THROUGHOUT THE COMPLAINT, BUT I WILL GIVE YOU SOME EXAMPLES.

17 **THE COURT:** WHAT PAGE?

18 **MS. STRICKLAND:** THE ENTIRE THEORY OF THEIR CASE IS
19 THAT THIS WAS A FIXED LONG-TERM LOAN. THAT'S WHAT THE CASE ALL
20 ABOUT, STARTING WITH PARAGRAPH ONE, PARAGRAPH TWO, PARAGRAPH
21 TWENTY-FIVE.

22 BUT, MOST INTERESTINGLY, PARAGRAPH 30, WHICH IS THE
23 SOLICITATION THAT THEY'RE NOW TRYING TO WRITE OUT OF THE CASE,
24 WHICH SAYS IN MARKETING THE LOANS TO CUSTOMERS -- CONSUMERS --
25 I'M SORRY -- CHASE POSITIONED THE LONG-TERM FIXED RATE LOANS AS

1 COMPETITIVE WITH OTHER LOANS IT CONSIDERED SIMILAR TO THE
2 LONG-TERM FIXED RATE LOAN THAT IT WAS OFFERING SUCH AS
3 UNSECURED PERSONAL LOAN, HOME EQUITY LOAN, AUTO LOAN.

4 **THE COURT:** OKAY.

5 **MS. STRICKLAND:** THIS IS THEIR THEORY. IT'S NOT THE
6 THEORY THAT WAS JUST ARTICULATED. IT IS REPEATED AGAIN IN
7 PARAGRAPH 36.

8 **THE COURT:** WHY DO YOU THINK THIS IS DIFFERENT THAN
9 WHAT MS. CABRASER SAID?

10 **MS. STRICKLAND:** BECAUSE MS. CABRASER SAYS IT DOESN'T
11 MATTER IF IT WAS AN INCIDENTAL PURCHASE OR A LONG-TERM, MORE
12 SUBSTANTIAL PURCHASE, THE POINT IT'S ALL THE SAME, BUT THAT'S
13 NOT WHAT THEIR COMPLAINT SAYS. THEIR COMPLAINT CALLS OUT WHAT
14 THEY PERCEIVE TO BE LONG-TERM TYPE COMMITMENTS. THEY USE THAT
15 TERM. THEY SAY THESE TERMS -- THESE LOANS WERE NOTHING LIKE
16 THE UNSECURED PERSONAL LOANS, HOME EQUITY LOANS OR NEW AUTO
17 LOANS AT PARAGRAPH 36.

18 **THE COURT:** PARDON ME? I'M SORRY.

19 **MS. STRICKLAND:** I'M SORRY.

20 **THE COURT:** I'M MISSING THE POINT. I THINK WHAT
21 THEY'RE SAYING IS IF YOU COULD PAY OFF THESE LONG-TERM LOANS
22 WITH -- I'M NOT SURE IF SHE'S TRYING TO SAY IT WAS MARKETING TO
23 PAY OFF LONG-TERM LOANS, SO THEN YOU WOULD THINK YOU WOULD HAVE
24 THE INTEREST RATE FOR THE SAME LENGTH AS THAT LONG-TERM FIXED
25 RATE LOAN WOULD HAVE, OR SHE'S JUST COMPARING IT HERE AS

1 SIMILAR TO.

2 BUT LET'S SAY -- THAT SOUNDS LIKE IT IS CONSISTENT
3 WITH WHAT MS. CABRASER WAS SAYING HERE JUST A LITTLE WHILE AGO,
4 THAT THE EXPECTATION, AS ARGUED BY HER, IS THAT YOU WOULD HAVE
5 A LOAN THAT WOULD ESSENTIALLY GO ON WITHOUT ANY CHANGE IN
6 TERMS.

7 NOW, I BELIEVE THAT YOU WANT TO ARGUE THAT THAT IS
8 NOT SHOWN BY THE SOLICITATIONS AND THAT SOME OF THE
9 SOLICITATIONS DIFFER IN THAT REGARD, BUT MAYBE YOU DIDN'T WANT
10 TO ARGUE THAT.

11 **MS. STRICKLAND:** THE THEORY OF THEIR CASE, AS IT'S
12 ARTICULATED IN THE COMPLAINT, IS THESE WERE EQUIVALENT TO
13 THINGS LIKE HOME EQUITY LOANS.

14 **THE COURT:** OKAY.

15 **MS. STRICKLAND:** AND AUTO LOANS.

16 **THE COURT:** ALL RIGHT.

17 **MS. STRICKLAND:** OUR POINT IS THAT THE SOLICITATIONS
18 DIFFER, AND THAT'S NOT WHAT THE SOLICITATIONS ALL SAY.

19 **THE COURT:** WAIT A MINUTE. DO SOME SOLICITATIONS SAY
20 WHAT SHE IS STATING IN HER COMPLAINT? MS. CABRASER, FOR
21 EXAMPLE, AT 30? PARAGRAPH 30? AND SOME OF THEM DON'T?

22 IN OTHER WORDS, IF WHAT YOU'RE TRYING TO SAY IS: SHE
23 MAY HAVE A PRETTY GOOD CASE FOR THIS GROUP THAT'S GOT THIS
24 SOLICITATION, BUT THIS OTHER GROUP GOT AN ENTIRELY DIFFERENT
25 SOLICITATION, AND WE HAVE A MUCH STRONGER ARGUMENT ON THAT, AND

1 THERE'S NO WAY YOU CAN TREAT THESE PEOPLE EQUALLY. NOW, IF
2 THAT WERE THE CASE, IF YOU COULD SHOW THAT THAT --

3 **MS. STRICKLAND:** I THINK THAT'S EXACTLY OUR POINT. I
4 DON'T THINK THEY HAVE A GOOD CASE ON ANYBODY, OBVIOUSLY. BUT I
5 THINK THAT THE SOLICITATIONS THE WAY THEY HAVE FRAMED UP THE
6 CASE IN THE COMPLAINT VARY.

7 BUT CAN I ALSO MAKE ANOTHER POINT, WHICH IS, WE KEEP
8 HEARING ARGUMENT ABOUT THE REASONABLE EXPECTATION FROM THE
9 CONTRACT. THE CONTRACT CLAIM HAS BEEN RULED ON BY THIS COURT.
10 WE ARE HERE ON THE BREACH OF THE IMPLIED COVENANT CLAIM, WHICH
11 MEANS THEY NEED TO SHOW SOMETHING DIFFERENT.

12 **THE COURT:** I THINK YOU ARE MISINTERPRETING
13 MS. CABRASER'S ARGUMENT, THE COURT'S DISCUSSION OF THE MATTER.
14 NOBODY'S GOING BACK TO TAKE BACK A RULING THAT WAS IN YOUR
15 FAVOR ON THE EARLIER MATTER.

16 LET'S JUST MOVE ON. FRANKLY, I HAVEN'T HEARD YET
17 WHERE YOU FEEL THAT THE DIFFERENCES ACTUALLY LIE THAT ARE
18 MATERIAL TO THE POINT THAT THEY'RE MAKING, WHICH WAS AN
19 EXPECTATION OF A LONG-TERM LOAN. IF IT'S BASED ON THE
20 SOLICITATIONS AND THE SOLICITATIONS WERE DIFFERENT, THEN THAT
21 MIGHT BE A POINT THAT YOU COULD MAKE, AND I GUESS I'LL GO BACK
22 AND LOOK. BUT, AS I SAY, IT WOULD HAVE BEEN HELPFUL TO HAVE
23 THAT POINT MADE CLEAR EARLIER IF THAT'S YOUR STRONGEST POINT.

24 I'LL ALSO GO BACK AND LOOK AT NEMEC, BUT I THINK
25 THAT, ULTIMATELY, THAT MAY BE WELL BE FOUND TO BE NOT AN

1 INDIVIDUALIZED MATTER. BUT, AGAIN, IF YOU WANTED TO POINT ME
2 TO SPECIFICALLY WHERE, I CAN'T FISH IT ALL OUT NOW, BUT I'LL
3 MAKE A NOTE OF IT. I WILL GO BACK AND LOOK AT IT. I AM GOING
4 TO GO BACK AND LOOK AT IT ANYWAY.

5 **MS. STRICKLAND:** YOUR HONOR, WE ACTUALLY PUT THOSE IN
6 THE O'DONNELL DECLARATION. I POINTED OUT SOME OF THOSE
7 DIFFERENCES. WE DO THINK --

8 **THE COURT:** LET'S SEE HERE. HANG ON, RUSTLING
9 PAPERS. I'M NOT SURE IF I HAVE THAT WHERE I CAN GET MY HANDS
10 ON IT QUICKLY. SOMEBODY IS POINTING IT IS UP HERE. I HAD
11 SOMEONE BRING IT OUT HERE. I MAY NOT HAVE IT IMMEDIATELY IN
12 FRONT OF ME RIGHT NOW, AND IF I DON'T, I DON'T. YES, I DO.
13 I'M SORRY. I DO. IT GOT BURIED.

14 **MS. STRICKLAND:** BUT, YOUR HONOR, ALSO, THIS IS NOT
15 OUR ONLY POINT. I KNOW WE'VE SPENT A LOT OF TIME ON IT TODAY
16 RESPONDING.

17 **THE COURT:** IT'S ONE THAT'S INTERESTING.

18 **MS. STRICKLAND:** RIGHT.

19 **THE COURT:** THAT'S WHY I'M FOCUSING ON IT. SOME OF
20 YOUR OTHER POINTS I ALREADY THOUGHT ABOUT.

21 OKAY. WHERE WOULD YOU LIKE ME TO LOOK? DO YOU WANT
22 TO GET THE O'DONNELL DECLARATION IN FRONT OF YOU? EXHIBIT B-1
23 HAS SOLICITATIONS.

24 **MS. STRICKLAND:** YOUR HONOR, A PERFECT COMPARISON IS
25 TAKING THE SOLICITATION THEY RELY ON IN THE COMPLAINT, JUST BY

1 WAY OF EXAMPLE, AT PARAGRAPH 30, WHICH IS THE --

2 THE COURT: OKAY.

3 MS. STRICKLAND: -- BOX SOLICITATION.

4 THE COURT: JUST A MINUTE. YOU WANT ME TO COMPARE
5 THAT WITH ONE OF THE O'DONNELL EXHIBITS?

6 MS. STRICKLAND: RIGHT.

7 THE COURT: OKAY. RIGHT HERE THEY'RE JUST MAKING --
8 OKAY. THIS IS THE ONE WITH THE UNSECURED PERSONAL LOAN, HOME
9 EQUITY LOAN, AND NEW AUTO LOAN. OKAY. THAT WAS A PRETTY GOOD
10 ONE FOR THE PLAINTIFF. THAT'S WHY THEY USED IT. YOU SAY THERE
11 ARE OTHERS THAT AREN'T AS GOOD, AND THAT WOULD MAKE THEM
12 DIFFERENT CLAIMS.

13 MS. STRICKLAND: SO, FOR EXAMPLE, YOUR HONOR, EXHIBIT
14 B-4 TO THE O'DONNELL DECLARATION --

15 THE COURT: HOLD ON. I CAN GET THAT IN FRONT OF ME
16 VERY QUICKLY. ALL RIGHT. AND --

17 MS. STRICKLAND: -- TALKS ABOUT A VARIETY OF THINGS
18 INCLUDING.

19 THE COURT: OKAY. TRY AND POINT ME TO A PARTICULAR
20 SECTION OF IT. I'LL TRY AND HIGHLIGHT WHAT YOU'RE TALKING
21 ABOUT.

22 MS. STRICKLAND: YOUR HONOR, EXHIBIT B-4 TALKS ABOUT
23 HOME IMPROVEMENT, BUT IT ALSO TALKS ABOUT VACATION, WHICH IS A
24 SHORT-TERM USE OF MONEY.

25 THE COURT: WHEN YOU SAY "IT TALKS ABOUT," CAN YOU

1 POINT WHERE IT'S TALKING?

2 **MS. STRICKLAND:** YOUR HONOR, IT IS ON THE FIRST PAGE
3 OF EXHIBIT 3778.

4 **THE COURT:** YES. OKAY. WAIT A MINUTE. 3778?

5 **MS. STRICKLAND:** IT'S A BATES NUMBER.

6 **THE COURT:** SORRY. I'M IN THREE. THAT'S THE PROBLEM
7 YOU WANTED ME TO LOOK AT FOUR.

8 **MR. NEWMAN:** IT IS THREE, YOUR HONOR. IT'S PAGE 26
9 OF 42 OF DOCUMENT 131.

10 **THE COURT:** WAIT, WAIT. DO YOU WANT ME TO LOOK AT
11 B-3 OR B-4. THAT'S THE FIRST QUESTION.

12 **MS. STRICKLAND:** YOU CAN START WITH B-3, YOUR HONOR,
13 HOW'S THAT? SINCE YOU WERE ON B-3. B-3, AND IT'S DOCUMENT 131
14 PAGE 23 OF 42.

15 **THE COURT:** I'M SORRY. PAGE -- YES, I'M LOOKING AT
16 THAT.

17 **MS. STRICKLAND:** OKAY. THIRD PARAGRAPH ON THE FIRST
18 PAGE WHERE IT SAYS "RIGHT TODAY SAVE TODAY," RIGHT BELOW THAT.

19 **THE COURT:** JUST A MOMENT. OKAY. I SEE "RIGHT TODAY
20 SAVE TODAY." WHAT DO YOU WANT?

21 **MS. STRICKLAND:** "CONSOLIDATE YOUR BILLS."

22 **THE COURT:** YES.

23 **MS. STRICKLAND:** "PURCHASE NEW FURNITURE OR A
24 COMPUTER, MAKE A DOWN PAYMENT ON A NEW CAR, TAKE A VACATION."

25 **THE COURT:** OKAY. AND THE MAXIMUM THAT THEY CAN

1 WRITE HERE IS HOW MUCH?

2 MS. STRICKLAND: YOUR HONOR, IT VARIED BY CARDHOLDER.

3 THE COURT: OH, OKAY. DOES THAT MAKE A DIFFERENCE?

4 MS. STRICKLAND: PRESUMABLY, DEPENDING UPON WHAT THE
5 USE WAS FOR.

6 THE COURT: WHAT WAS THE HIGHEST --

7 MS. STRICKLAND: THE AMOUNT YOU COULD WRITE IT FOR
8 WOULD GO TO THE USE, OBVIOUSLY.

9 THE COURT: THEY ONLY GOT A LIMITED NUMBER OF CHECKS.
10 ARE WE TALKING ABOUT FIVE THOUSAND PER CHECK, OR SOMETHING LIKE
11 THAT?

12 MS. STRICKLAND: IT VARIED QUITE A BIT, YOUR HONOR.
13 THERE ARE VERY PEOPLE WHO HAD VERY HIGH LIFE-OF-LOAN BALANCES,
14 AND PEOPLE WHO HAD VERY SMALL BALANCES. WIDELY DIFFERENT.

15 THE COURT: OKAY. I LOOKED AT THAT. NOW, YOU WANTED
16 TO COMPARE THAT WITH WHAT WAS KIND OF A SCHEMATIC HERE. DO WE
17 HAVE THAT ACTUAL SOLICITATION ATTACHED AS THE EXHIBIT? YES, WE
18 DO.

19 MS. STRICKLAND: WE DO, YOUR HONOR.

20 THE COURT: I AM LOOKING AT IT.

21 MS. STRICKLAND: IT'S ONE OF THE EXHIBITS TO THE
22 PLAINTIFFS' DEPOSITION. IT SKIPS EXHIBIT 5.

23 THE COURT: I CAN LOOK ALSO AT THE COMPLAINT. OKAY.

24 NOW, LET'S SAY THAT YOU HAVE THE -- ONE PERSON GOT
25 THE SOLICITATION EXHIBIT A TO THE COMPLAINT AND ONE PERSON GOT

1 THE SOLICITATION EXHIBIT B TO THE O'DONNELL DECLARATION, RIGHT?
2 AND WHAT WOULD THE DEFENDANT'S ARGUMENT BE THEN, GIVEN THAT
3 DISTINCTION?

4 **MS. STRICKLAND:** YOUR HONOR, THAT'S ALSO EXHIBIT A TO
5 THE COMPLAINT, FOR EASE OF REFERENCE.

6 THE ARGUMENT WOULD BE THAT, UNDER PLAINTIFFS' THEORY
7 OF LONG-TERM FINANCE, THAT THE EXPECTATION AS TO WHETHER ONE
8 REALLY CONSTITUTED LONG-TERM FINANCE VERSUS ANOTHER WOULD BE
9 VERY DIFFERENT. YOU DON'T HAVE, QUOTE, LONG-TERM FINANCE TO
10 ENHANCE YOUR WARDROBE OR TAKE A VACATION. YOU MIGHT HAVE
11 LONG-TERM FINANCE TO -- IN TERMS OF A HOME EQUITY LOAN OR A NEW
12 AUTO LOAN. THERE IS A SUBSTANTIAL DISTINCTION, AND THEIR
13 THEORY IS LONG-TERM.

14 **THE COURT:** OKAY. OKAY. ALL RIGHT. I'M GOING TO
15 GIVE MS. CABRASER HER ONE BRIEF REPLY SINCE THEY HAVE THE
16 BURDEN ON THE MOTION, AS YOU POINTED OUT.

17 **MS. STRICKLAND:** THANK YOU, YOUR HONOR.

18 MAY I JUST MAKE ONE MORE POINT, WHICH IS THROUGHOUT
19 MS. CABRASER'S ARGUMENT, THERE'S BEEN A LOT OF ARGUMENT FROM
20 THE PLAINTIFFS, BUT GOING EXACTLY TO THE BURDEN POINT, AND THE
21 CASES ARE VERY CLEAR.

22 ASSURANCES FROM COUNSEL -- AND PARTICULARLY ON THIS
23 DAMAGES POINT BUT AS WELL AS OTHERS -- THAT THEY CAN ACTUALLY
24 TRY THE CASE IN SOME COMMON WAY ARE NOT SATISFACTORY TO MEET
25 THEIR BURDEN, AND WE WOULD SUBMIT THAT BURDEN HAS NOT BEEN MET.

1 **THE COURT:** I THINK THE ARGUMENT HERE IS ALL THE
2 FIGURES ARE THERE, THEY CAN'T BE IN DISPUTE, WHATEVER PERSON
3 PAID THEY PAID, SOME MATH THEY CAN FIGURE IT OUT. I THINK
4 THAT'S THE POINT BEING MADE. OKAY IT'S NOT SO MUCH SOFTER
5 EVIDENCE AS HARD EVIDENCE.

6 ALL RIGHT. MS. CABRASER, AS I UNDERSTAND THEN, THE
7 ARGUMENT IS THAT THE DEFENSE WOULD BE DIFFERENT AND THE
8 STRENGTH OF THE DEFENSE WOULD BE DIFFERENT BASED ON DIFFERENT
9 SOLICITATIONS?

10 **MS. CABRASER:** AND JUST LOOKING AT THE TWO VERSIONS
11 OF THE SOLICITATIONS THAT YOU JUST WENT THROUGH WITH DEFENSE
12 COUNSEL, EXHIBIT B TO MR. O'DONNELL AND EXHIBIT 5 TO MR. GIBBS,
13 OBVIOUSLY, MR. GIBBS IS A SPECIFIC EXAMPLE THAT ACTUALLY GOT
14 SENT OUT, AND MR. O'DONNELL IS A MORE GENERIC, BUT WE SUBMIT --

15 **THE COURT:** I'M SORRY. BY "GENERIC" YOU MEAN?

16 **MS. CABRASER:** I MEAN IT HAS "XXX" INSTEAD OF A
17 PARTICULAR 3.99 APR, BECAUSE WHAT WE'VE GOT IS WHAT WENT OUT,
18 WHAT WAS RECEIVED BY A CLASS MEMBER, AND THIS IS A -- THIS IS
19 THE MODEL. AND THE MODEL DOES NOT VARY, WE SUBMIT, IN ANY
20 MATERIAL RESPECT FROM THE SOLICITATIONS THAT WERE GOTTEN.

21 **THE COURT:** WELL, THE -- LET'S LOOK AT B-3 FOR A
22 MOMENT. THAT WAS THE ONE THAT I WAS DIRECTED TO.

23 **MS. CABRASER:** LET'S SEE.

24 **THE COURT:** DO YOU HAVE THE O'DONNELL DECLARATION?
25 IT IS KIND OF HARD -- THE WAY I HAVE THE TABS ARE ALL ONE ON

1 TOP OF OTHER, SO YOU HAVE TO PEEL IT BACK.

2 **MS. CABRASER:** I'M WEARING MY GLASSES.

3 **THE COURT:** SO WEARING YOUR GLASSES AND LOOKING ABOUT
4 IN THE MIDDLE ADJACENT TO WHERE IT SAYS "YYY" PERCENT APR, JUST
5 STARTING SLIGHTLY ABOVE THAT, "CONSOLIDATE YOUR BILLS," AND
6 THEN IT TALKS ABOUT GET FURNITURE, GET A COMPUTER, PUT IT IN
7 YOUR CHECKING ACCOUNT AND USE IT HOWEVER YOU WANT. OKAY.
8 THAT'S ONE TYPE OF SOLICITATION THEY SAY WENT OUT.

9 EXHIBIT A TO THE COMPLAINT, WHICH IS CROSS REFERENCED
10 IN THE COMPLAINT, HAS A COMPARISON OF INTEREST RATES THAT ONE
11 WOULD HAVE TO PAY ON THESE VARIOUS TYPES OF LOANS THAT SOMEBODY
12 MIGHT HAVE, AND THAT THIS WOULD BE A BETTER WAY TO GET MONEY.

13 **MS. CABRASER:** MM-HMM.

14 **THE COURT:** OKAY. THEN SHE SAYS: WELL, IF YOUR
15 THEORY IS THAT PEOPLE HAD A REASONABLE EXPECTATION OF A
16 LONG-TERM LOAN AT A FIXED RATE WITH FIXED TERMS, THEN THIS
17 PARTICULAR SOLICITATION THAT COMPARES THE LOAN WITH OTHER
18 SIMILAR TYPES OF LOANS THAT HAVE FIXED TERMS WOULD BE ONE TYPE
19 OF ARGUMENT THE PLAINTIFFS COULD MAKE FOR THOSE PEOPLE WHO GOT
20 THAT SOLICITATION, BUT THAT THERE ARE OTHER PEOPLE THAT GOT
21 SIGNIFICANTLY DIFFERENT ONES, AND THEIR EXPECTATIONS WOULD BE
22 DISTINGUISHABLE IN THAT RESPECT BECAUSE THEY WEREN'T POINTED TO
23 THESE OTHER LONG-TERM, MORE FIXED TYPES OF LOANS.

24 **MS. CABRASER:** AND, YOUR HONOR, TO US THAT IS
25 IMMATERIAL.

1 WE ALSO NOTE IF THEY WANT TO ARGUE IT'S MATERIAL,
2 IT'S CATEGORICAL, NOT INDIVIDUAL. SO THAT WOULD BE A TYPE OF
3 SOLICITATION AN IDENTIFIABLE SUBSET OF THE CLASS GOT.

4 **THE COURT:** ARE YOU SAYING THERE SHOULD BE
5 SUBCLASSES?

6 **MS. CABRASER:** THAT'S AS FAR AS THAT ARGUMENT COULD
7 GO, AND WE DON'T THINK IT GOES THAT FAR, YOUR HONOR, BUT THE
8 VERY FARTHEST IT WOULD GO, BECAUSE THEY, YOU KNOW, THEY
9 SYSTEMATIZED THIS, AND THEY ARE STANDARD -- YOU KNOW, NONE OF
10 THESE WAS WRITTEN WITH A QUILL PEN, NONE OF THESE ARE
11 COMPLETELY INDIVIDUALIZED, NONE OF THEM HAS A PARTICULAR
12 RECIPIENT IN MIND. THEY ARE ALL CATEGORICAL.

13 WE SAY WITH RESPECT TO THE MATERIAL TERMS, YOU KNOW,
14 LOW APR, FIXED FOR THE LIFE OF THE LOAN, MAKE YOUR MINIMUM
15 PAYMENTS ON TIME, THAT'S WHAT'S MATERIAL.

16 AND, BY THE WAY, WHAT ALL OF THESE SOLICITATIONS SAY
17 IN ONE FORM OR ANOTHER, DESPITE WHAT PARTICULAR EXAMPLES THEY
18 GIVE OF WHAT YOU COULD USE OF THE MONEY FOR, IF YOU LOOK, FOR
19 EXAMPLE, AT EXHIBIT 5 TO THE GIBBS DECLARATION --

20 **THE COURT:** WAIT A MINUTE. WAIT A MINUTE. WAIT A
21 MINUTE.

22 I WILL HAVE TO WAIT AND GET THAT BECAUSE I DON'T HAVE
23 IT RIGHT HERE.

24 **MS. CABRASER:** BASICALLY, THEY ALL SAY YOU CAN USE IT
25 FOR WHATEVER YOU WANT.

1 THE O'DONNELL FORM SAYS, "REMEMBER, YOU CAN WRITE
2 CHECKS FOR ANY AMOUNT UP TO THE UNUSED PORTION, AND HOW YOU USE
3 IT IS UP TO YOU."

4 BASICALLY, THEY'RE SAYING THERE ARE DIFFERENT
5 EXAMPLES OF HOW YOU MIGHT USE IT IN DIFFERENT VERSIONS OF A
6 STANDARDIZED, EACH OF WHICH WAS REPLICATED THOUSANDS OF TIMES
7 OVER.

8 WE'RE SAYING WHAT'S IMPORTANT IS WHAT ALL THESE
9 LETTERS SAY IS HOW YOU USE IT IS UP TO YOU, HERE'S HOW YOU USE
10 IT, AND HERE'S WHAT THE DEAL TERMS ARE. IT'S ALL THE SAME.

11 **THE COURT:** DON'T THE DEFENSES COUNT, THOUGH, IN
12 DETERMINING WHETHER OR NOT THE ISSUES ARE -- THAT COMMON ISSUES
13 PREDOMINATE TO A CERTAIN EXTENT OR NOT? IN OTHER WORDS, IF THE
14 PLAINTIFF SAYS: WELL, THIS -- WE'RE MAKING THE SAME CLAIM AS
15 TO EVERYBODY AND THE DEFENDANT SAYS, BUT THERE ARE DIFFERENCES
16 IN HOW YOU'RE SITUATED AND HOW THE MATTER CAN BE ARGUED, WOULD
17 THAT --

18 **MS. CABRASER:** THAT ARGUMENT IS NOT AS AVAILABLE TO
19 THE DEFENDANTS HERE AS IT WOULD BE IN A TYPICAL CLASS ACTION.

20 **THE COURT:** BECAUSE?

21 **MS. CABRASER:** BECAUSE IN THIS CASE THIS IS NOT A
22 CLASS OF EVERYONE WHO GOT THESE LETTERS AND WHO TOOK OUT THESE
23 LOANS. THIS IS A CLASS THAT WAS SELECTED BY CHASE OF A
24 SPECIFIC SUBSET, LESS THAN ONE PERCENT OF PEOPLE WHO NOT ONLY
25 GOT THE LETTERS, ACTED IN RESPONSE TO THE LETTERS, TOOK OUT THE

1 LOANS UNDER THE SAME DEAL TERMS, BUT WHO ADHERED TO THE DEAL
2 TERMS IN SUCH A WAY THAT THEY PRESERVED THEIR LOW APR BY MAKING
3 THEIR MINIMUM PAYMENTS TO THE POINT AT WHICH CHASE DETERMINED
4 WITH RESPECT TO THIS DEFINED CATEGORY OF PEOPLE, AND ONLY THESE
5 PEOPLE, THESE ARE NOT SUFFICIENTLY PROFITABLE, THESE ARE THE,
6 QUOTE, LOW ENGAGERS, UNQUOTE.

7 **THE COURT:** OKAY. YOU ARE JUST SAYING THEY LUMPED
8 THEM TOGETHER --

9 **MS. CABRASER:** FOR A REASON.

10 **THE COURT:** -- AND IF THAT WAS THE BE-ALL AND END-ALL
11 OF THE DISCUSSION, THAT WOULD BE ONE THING, BUT I DON'T BELIEVE
12 THAT IT IS.

13 ONE FINAL THING HERE. MS. STRICKLAND, I THINK, SAID
14 SOMETIME ABOUT AN HOUR AND A HALF AGO -- IN FACT, I REALIZE WE
15 HAVE BEEN GOING WITH NO BREAK FOR THE REPORTER, AND I DON'T
16 KNOW -- WE'RE GOING TO WRAP THIS UP VERY SHORTLY. IF SHE WANTS
17 TO STICK IT OUT AND JUST GET OUT OF HERE, THAT MIGHT BE BETTER.

18 (THE REPORTER NODS AFFIRMATIVELY.)

19 **THE COURT:** OKAY. WE'LL KEEP GOING. I HAD NO IDEA
20 THIS WAS TAKING SO, SO LONG.

21 OKAY. VERY BRIEFLY.

22 SOMEWHERE A LONG TIME AGO I THOUGHT MS. STRICKLAND
23 SAID SOMETHING ABOUT VERY FEW PEOPLE, OR MAYBE ONLY ONE PERSON,
24 GOT EXHIBIT A TO THE COMPLAINT; IS THAT CORRECT?

25 **MS. CABRASER:** I'M NOT SURE IF THAT'S CORRECT OR NOT.

1 I'M GOING TO ASK MY TABLE FULL OF CO-COUNSEL TO VERIFY THAT OR
2 NOT.

3 **THE COURT:** OKAY. JUST STOP FOR A MINUTE. ONLY ONE
4 PLAINTIFF GOT IT? ALL RIGHT.

5 AND ARE THERE ANY SIMILAR SOLICITATIONS WITH THIS
6 TYPE OF COMPARATIVE BREAKDOWN, BECAUSE IF THERE AREN'T AND THE
7 AVERAGE PERSON -- IN FACT, EVERYBODY ELSE GOT SOMETHING THAT
8 JUST SAID YOU CAN BUY A TV AND DIDN'T MAKE THIS KIND OF LOAN
9 COMPARISON, THEN MAYBE THIS PERSON JUST DOESN'T BELONG IN THE
10 CLASS.

11 **MS. CABRASER:** YOUR HONOR, I THINK WE WOULD -- I
12 DON'T HAVE ALL OF THOSE EXHIBITS RIGHT IN FRONT OF ME TO
13 COMPARE THEM, AND I DON'T HAVE THE ANSWER TO YOUR QUESTION, BUT
14 WE CAN GET YOU THE ANSWER TO THAT SPECIFIC QUESTION, BECAUSE I
15 THINK YOU'RE RIGHT. IF THAT'S A ONE OFF, IF IT TRULY IS A ONE
16 OFF, THEN THAT PERSON MIGHT NOT BELONG IN THIS CLASS AND WE
17 SHOULD DETERMINE THAT NOW, RATHER THAN LATER. I DON'T THINK
18 THAT'S CORRECT.

19 I THINK THIS WAS ALSO A STANDARD FORM THAT MANY
20 PEOPLE GOT, AND I ALSO THINK WITH RESPECT TO THE MATERIAL
21 TERMS, THE DEAL TERMS IN THAT FORM IT IS LIKE LIKEWISE
22 IDENTICAL. I WANTED TO PROVIDE THE COURT A COUNTER-REFERENCE
23 TO THE MASTER COMPLAINT PARAGRAPHS, BECAUSE MS. STRICKLAND
24 POINTED OUT VARIOUS PARAGRAPHS THAT SHE THOUGHT --

25 **THE COURT:** OKAY.

1 **MS. CABRASER:** -- DEFINED OUR THEORY OF THE CASE.

2 REMEMBER THAT WE HAVE ONE CLAIM IN THIS CASE, AND
3 THAT IS OUR FIRST CLAIM FOR RELIEF. THE MASTER COMPLAINT STILL
4 ASSERTS THE FACTS AND ALL THE CLAIMS BUT ONLY ONE CLAIM IS
5 OPERATIVE.

6 AND THE PARAGRAPHS THAT ARE SPECIFICALLY PERTINENT TO
7 THAT CLAIM FOR BREACH OF THE COVENANT APPEAR AT PARAGRAPHS 128
8 THROUGH 136 OF THE MASTER COMPLAINT. AND IN THOSE COMPLAINTS
9 IT'S NOT ABOUT WHAT THE CHECK WAS USED FOR, BECAUSE THE
10 SOLICITATIONS SAID USE IT ANY WAY YOU WANT. WHAT WE SAID WAS
11 WHAT WAS IMPORTANT WAS LONG-TERM FIXED RATE, LOW APR AS LONG AS
12 MINIMUM PAYMENTS ARE MADE.

13 **THE COURT:** ALL RIGHT.

14 **MS. CABRASER:** JUST SO -- LET YOU KNOW OUR THEORY
15 HASN'T CHANGED. THE PEOPLE IN THE CLASS HAVEN'T CHANGED.

16 **THE COURT:** IS THERE LANGUAGE THAT SAYS THIS IS
17 LONG-TERM FIXED? I DON'T THINK IT'S IN THERE. THAT'S THE
18 INFERENCE.

19 **MS. CABRASER:** THAT WAS OUR INFERENCE, BUT THAT WAS
20 AN INFERENCE WE MADE IN THE COMPLAINT.

21 **THE COURT:** OKAY. THANK YOU.

22 **MS. CABRASER:** AND IN POINT OF FACT -- I'M SORRY,
23 YOUR HONOR. I WILL STOP. I DIDN'T MEAN TO INTERRUPT YOU.

24 **THE COURT:** I JUST WANTED TO SAY IF THE INFERENCE
25 VARIES FROM SOLICITATION TO SOLICITATION IN A MEANINGFUL WAY,

1 IT MAY BE A PROBLEM THAT MIGHT HAVE TO BE ADDRESSED. OKAY.
2 THAT'S WHAT I AM LOOKING AT.

3 **MS. CABRASER:** WE DON'T THINK IT DOES, YOUR HONOR.

4 **THE COURT:** OKAY. JUST TO GIVE YOU AN EXAMPLE, IF
5 YOU'VE GOT A WAGE AND HOUR CASE AND SOMEBODY SAYS: THE
6 DEFENDANT LUMPED US ALL TOGETHER, EVERYBODY WITH THIS TITLE GOT
7 PUT INTO AN EXEMPT EMPLOYEE STATUS, DOESN'T GET MEAL BREAKS,
8 DOESN'T GET OVERTIME, WHATEVER, THAT DOESN'T END THE
9 DISCUSSION. AND THEN THE DEFENDANT CAN SAY: YES, BUT WHAT OUR
10 THEORY IS OF WHY YOU'RE THERE IS BECAUSE YOU -- I DON'T KNOW --
11 YOU'RE INVOLVED IN OUTSIDE SALES. THEN YOU HAVE TO LOOK AT
12 WHETHER OR NOT EACH OF THESE PEOPLE DID THE SAME THING OR
13 WHETHER THEY DID OTHER THINGS.

14 WELL, HERE WHAT'S HAPPENING IS THEY'RE SAYING:
15 HERE'S OUR DEFENSE; YOU DIDN'T HAVE ANY REASON TO THINK THIS.
16 THEN THEY SAY: LOOK AT ALL THESE DIFFERENT SOLICITATIONS.
17 NOW, THERE ARE ONLY A LIMITED NUMBER. IT ISN'T THE MILLION
18 THAT ARE IN YOUR CLASS. BUT I CAN'T EVEN TELL HOW MANY
19 DIFFERENT ONES THERE ARE, HOW MANY DIFFER SIGNIFICANTLY AT THE
20 MOMENT. ALL OF THIS IS JUST COMING UP KIND OF NOW. ALL RIGHT?

21 SO I WILL TAKE A LOOK, AND IF WE NEED EXTRA EVIDENCE,
22 WE WILL LET YOU KNOW. IN OTHER WORDS, AFTER I GO BACK AND LOOK
23 AT IT, IF KNOWING WHAT IS AT LEAST AT THE MOMENT A CONCERN, IT
24 MAY NOT BE THE DISPOSITIVE IDEA HERE, BUT KNOWING IT'S A
25 CONCERN, IF ANYBODY GOES BACK AND THINKS THEY HAVE A QUICK AND

1 EASY ANSWER, THEY CAN PROPOSE ADDING IT TO THE RECORD AND GIVE
2 THE OTHER SIDE A CHANCE TO BE HEARD, BUT THAT WOULD HAVE TO BE
3 NO LATER THAN A WEEK FROM TODAY. OKAY? ALL RIGHT. BECAUSE I
4 DON'T WANT THIS TO BE DRAGGED OUT WHERE I DON'T KNOW WHERE
5 SOMEBODY IS GOING TO DO SOMETHING.

6 SO IF THERE'S SOMETHING THAT BEARS ON THIS PARTICULAR
7 QUESTION OF WHO GOT WHAT AND HOW MANY OF THEM GOT IT, BASED ON
8 WHAT'S BEEN SHOWN HERE, AND EITHER YOU BOTH OR ONE OF YOU
9 THINKS IT WOULD HELP TO CLARIFY THAT, YOU CAN CONSIDER
10 REQUESTING THE ABILITY TO DO THAT. I DON'T MEAN SURVEYS. I
11 JUST MEAN THIS UNDISPUTED IDEA OF HOW MANY PEOPLE GOT "X," HOW
12 MANY PEOPLE GOT "Y" SOLICITATION.

13 **MS. CABRASER:** WE WILL TAKE A VERY CAREFUL LOOK AT
14 THAT, YOUR HONOR.

15 JUST TO MAKE THIS POINT CLEAR, THE LOANS AT ISSUE ARE
16 LIFE-OF-THE-LOAN LOANS, LOL'S. THAT'S WHAT CHASE CALLS THEM.
17 SO THE CHARACTERISTIC FACTOR IS LOW RATE FOR LIFE OF THE LOAN
18 IF YOU OBEY THE TERMS. THEY ARE NOT LTL, LONG-TERM LOANS.
19 THAT'S NOT WHAT CHASE CALLED THEM. THAT'S NOT WHAT WE TOOK
20 THEM --

21 **THE COURT:** THAT'S AN ARGUMENT.

22 ALL I'M SAYING IS IF THIS BECOMES RELEVANT -- AND I'M
23 NOT SAYING IT'S DISPOSITIVE. IT'S JUST IF I LOOK AT IT AND I
24 THINK I NEED SOMETHING, I MAY LET YOU KNOW. IF YOU THINK YOU
25 HAVE AN EASY ANSWER TO DISPOSING OF THE ISSUE WITHOUT CONCEDED

1 ITS MERIT, EVERYBODY HAS UNTIL NEXT FRIDAY AT 2:00 O'CLOCK TO
2 DO IT.

3 **MS. CABRASER:** ALL RIGHT.

4 **THE COURT:** I'M NOT SAYING YOU AUTOMATICALLY CAN.
5 YOU ARE GOING TO HAVE TO ASK LEAVE TO DO IT, AND THEN WE'LL SEE
6 WHERE WE ARE.

7 **MS. CABRASER:** WE'LL LOOK AT THAT VERY CAREFULLY,
8 YOUR HONOR. WE APPRECIATE THAT. THANK YOU.

9 **THE COURT:** ALL RIGHT. SO I'M GOING TO DEEM THIS
10 MATTER SUBMITTED. I DON'T KNOW EXACTLY WHEN WE STARTED, BUT
11 IT'S NOW 11:30, AND I THINK IT'S BEEN QUITE A WHILE.

12 SO I WILL AT THIS POINT TAKE IT UNDER SUBMISSION, BUT
13 YOU HAVE THE -- I WON'T RULE BEFORE NEXT FRIDAY. I'M GOING TO
14 GIVE YOU A CHANCE TO TAKE A LOOK AT THIS MATTER THAT, FRANKLY,
15 I THINK IS JUST BEING CLARIFIED AT THIS POINT.

16 OKAY. ALL RIGHT. WE ARE IN RECESS.

17 (PROCEEDINGS ADJOURNED.)
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CERTIFICATE OF REPORTER

I, JOAN MARIE COLUMBINI, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN MDL 09-2032, IN RE: CHASE BANK, USA, NA, CHECK LOAN CONTRACT LITIGATION, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

JOAN MARIE COLUMBINI, CSR 5435, RPR

MONDAY, MARCH 21, 2011